UNITED STATES REPORTS

VOLUME 503

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1991

FEBRUARY 25 THROUGH MAY 1, 1992

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 1996

Printed on Uncoated Permanent Printing Paper

For sale by the U. S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
THURGOOD MARSHALL, Associate Justice.

OFFICERS OF THE COURT

WILLIAM P. BARR, Attorney General.
KENNETH W. STARR, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
SHELLEY L. DOWLING, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective November 1, 1991, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, CLARENCE THOMAS, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

November 1, 1991.

(For next previous allotment, and modifications, see 498 U. S., p. VI, and 501 U. S., p. V.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1988 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

	Page
Abadia *v.* United States	949
Abate *v.* Department of Housing and Urban Development	942
Abdullah; Gunter *v.*	955
Abraham *v.* Harris	952
Abrego *v.* United States	950
Abreu *v.* United States	994
Accardo *v.* Commissioner	907
Action for Children's Television; Children's Legal Foundation *v.*	913
Action for Children's Television; FCC *v.*	914
Action S. A.; Rich *v.*	1006
Adam Cab Co. *v.* Collins	960
Adam Cab, Inc. *v.* Collins	960
Adamick *v.* AMEX	1006
Adedeji *v.* United States	912
Adolph Rub Trust; Rub *v.*	911,1000
Aetna Life & Casualty; Covillion *v.*	922
After Midnight *v.* Philadelphia	984
Agati *v.* United States	964
Age *v.* United States	976
Agomo *v.* Collins	989
Ahmed *v.* Stone	953
Aiken; Wickliffe *v.*	974
Air Jamaica, Ltd.; Hamilton *v.*	938
Ajayi *v.* United States	976
Akiona *v.* United States	962
Alabama; Cox *v.*	987
Alabama; Duren *v.*	974
Alabama; Fisher *v.*	941
Alabama; Henderson *v.*	908
Alabama; Hooper *v.*	920

	Page
Alabama; White *v.*	953
Alan Co. *v.* Interstate Commerce Comm'n	1004
Alaska; United States *v.*	569
Alaska Airlines, Inc. *v.* United Airlines, Inc.	977
Albury *v.* United States	947
Aldridge *v.* U. S. District Court	988
Alexander; Cook *v.*	905
Al Kashif *v.* United States	975
Allegany County *v.* United States	903,917
Allen *v.* Louisiana State Bd. of Dentistry	1006
Allen *v.* United States	936,942
Alleyn *v.* Warden, Smithfield State Prison	910
Allied-Signal Corp.; Christopherson *v.*	912
Allied-Signal, Inc. *v.* Director, Division of Taxation	928,969,1002
Allred *v.* United States	923
Almonte *v.* United States	1010
Altoona; Starr *v.*	907
Alzamora *v.* United States	961
American Telephone & Telegraph Co.; Phonetele, Inc. *v.*	914
AMEX; Adamick *v.*	1006
Amos *v.* United States	1010
Anchorage; De Nardo *v.*	992
Anderson, *In re*	918,982,999
Anderson *v.* United States	923,995
Andrews *v.* Deland	967
Andrews *v.* Singletary	947
Angelone; Phelps *v.*	922
Aniskoff; Conroy *v.*	981
Anne Arundel County Republican Central Comm. *v.* State Administrative Bd. of Election Laws	969
Appalachian Ins. Co.; Donner *v.*	984
Arache *v.* United States	948
Argentina *v.* Weltover	917
Aristizabal *v.* United States	921
Arizona; Malumphy *v.*	991
Arizona *v.* Quinton	920
Arizona *v.* Taylor	998
Arkansas *v.* Oklahoma	91
Arkansas; Shabazz *v.*	910
Arky *v.* United States	908
Arlen *v.* United States	939
Armontrout; Ramsey *v.*	991
Armontrout; Schlup *v.*	909
Armontrout; Shackelford *v.*	991

	Page
Armontrout; Snyder *v.*	992
Arnold *v.* Kmart Corp.	975
Arnoldt *v.* United States	983
Artist M.; Suter *v.*	347
Ashba *v.* Indiana	1007
Ashburn *v.* Nix	1008
Associated General Contractors of Cal., Inc. *v.* San Francisco	985
Association. For labor union, see name of trade.	
Aten *v.* Neubert	945
Attorney General; Brown *v.*	1008
Attorney General; Doherty *v.*	901
Attorney General *v.* Flores	905
Attorney General; Moore *v.*	911
Attorney General of Miss.; Dupree *v.*	930
Attorney General of Mo.; Gamble *v.*	974
Attorney General of N. J. *v.* Ivy Club	914
Attorney General of N. C.; Head *v.*	904
Auburn Medical Center, Inc.; East Ala. Health Care Authority *v.*	936
Auburn Medical Center, Inc.; East Ala. Medical Center *v.*	936
Audinot *v.* United States	995
A. W. Chesterton Co.; Das *v.*	982
Ayars *v.* New Jersey	955
B. *v.* Charlotte M.	991
Baccam *v.* Iowa	962
Bacchus *v.* Postman	944
Bagguley *v.* United States	995
Bahr *v.* Department of Army	909,999
Bailes *v.* United States	964,972,1001
Bailey *v.* Noot	952
Bair; Tuggle *v.*	989
Baker, *In re*	931
Baker; Prunty *v.*	991
Baker *v.* United States	997
Balawajder *v.* Williams	972
Ball *v.* United States	991
Balsamo *v.* Mazurkiewicz	993
Banks; Williams *v.*	962
Barger *v.* Courier Journal & Louisville Times Co.	1006
Barker *v.* Kansas	594
Barlow; Union Mortgage Co. *v.*	931
Barnes *v.* First National Bank	999
Barnett *v.* United States	941
Barnhill *v.* Johnson	393
Barr; Brown *v.*	1008

	Page
Barr; Carter *v.*	909
Barr; Doherty *v.*	901
Barr *v.* Flores	905
Barr; Moore *v.*	911
Barrett *v.* United States	951
Barrios-Barcelona *v.* United States	965
Basham *v.* Blankenship	937
Bates; Union Oil Co. of Cal. *v.*	1005
Bath Iron Works Corp. *v.* Director, Office of Workers' Compensation Programs, Dept. of Labor	935
Battenfield *v.* Oklahoma	943
Batts *v.* United States	947
Bauman *v.* United States	949
Bausman; Thulen *v.*	906
Beck *v.* Beck	907
Bedford *v.* Florida	1009
Behrendt, *In re*	979
Beijing Ever Bright Industrial Co. *v.* Timber Falling Consultants	918
Belhumeur *v.* Massachusetts Ed. Assn.	1004
Benavides *v.* Diaz	988
Bender; Teamsters *v.*	986
Benedetto; NPM Group, Inc. *v.*	971
Benfield *v.* Saul	998
Berki *v.* United States	988
Berkowitz *v.* United States	988
Berman, *In re*	902
Bernardo *v.* United States	1006
Bette Mom's Tavern; Meyers *v.*	920
Bevill *v.* Mississippi	942
Beyer; Choice *v.*	967
Beyer; Simmons *v.*	944
Bickett *v.* United States	988
Billy G. *v.* United States	1010
Binkley *v.* Caterpillar, Inc.	926
Birsner *v.* Sivalignham	985
B. J. Alan Co. *v.* Interstate Commerce Comm'n	1004
Black; Smith *v.*	930
Black; Stringer *v.*	222
Blade *v.* United States	966
Blank, *In re*	956
Blankenship; Basham *v.*	937
Blankenship *v.* Zant	962
Blas *v.* Government of Guam	920
Blegen *v.* United Truck Maintenance	999

Page

Blumenfeld, *In re* 916
Board of Comm'rs, Orleans Levee Dist.; Newport Ltd. *v.* 970
Board of Ed. of Community Consolidated School Dist. No. 21 *v.* Illinois State Bd. of Ed. 934
Board of Ed. of Community Consolidated School Dist. No. 21; Illinois State Bd. of Ed. *v.* 934
Board of Ed. of Topeka, Shawnee County *v.* Brown 978
Board of Regents of Univ. of Colo.; Wirsing *v.* 906
Board of Zoning Appeals, Carroll County; Gordon *v.* 960
Bobo; Bonham *v.* 921
Bock *v.* United States 923
Boclair *v.* Illinois 962
Bodre *v.* United States 941
Bonham *v.* Bobo 921
Bonner, *In re* 902
Bonneville Power Administration; Public Utility Dist. No. 1, Douglas County *v.* 1004
Borchers *v.* United States 977
Borg; Klein *v.* 1008
Borough. Name of borough.
Bossier Parish Sheriff's Dept.; Marriman *v.* 993
Boston & Maine Corp.; Interstate Commerce Comm'n *v.* 407
Boston & Maine Corp.; National Railroad Passenger Corp. *v.* 407
Boston Teachers *v.* Morgan 983
Bouchard *v.* Regional Governing Bd. of Region V Mental Retardation Services 1005
Boudette *v.* Yavapai County 943
Bowden *v.* Florida 975
Bowers *v.* Perko 939
Bowers *v.* United States 1007
Boyd *v.* Ford Motor Co. 939
Boyle *v.* Texas 921
Bradley *v.* E. I. du Pont de Nemours & Co. 998
Bradshaw; Carlisle *v.* 960
Branch *v.* United States 999
Brandon Steel Decks, Inc. *v.* Hines 971
Brass Bull; Newport *v.* 959
Brennan *v.* Singletary 990
Brent *v.* United States 1011
Brigham Young Univ.; Marin *v.* 946
Brignoli *v.* Fowler 971
Briley; California Electric Co. *v.* 938
Broida *v.* Smith 1005
Brooks *v.* Georgia 910

	Page
Brooks *v.* Sulphur Springs Valley Electric Cooperative	938
Brooks; Weninger *v.*	921
Broward County; International Eateries of America, Inc. *v.*	920
Brown *v.* Barr	1008
Brown; Board of Ed. of Topeka, Shawnee County *v.*	978
Brown *v.* Illinois	999
Brown *v.* Stainer	989
Brown *v.* United States	953,976,994
Brown; Vasquez *v.*	1011
Brown *v.* William	909
Brown Group, Inc.; Hicks *v.*	901
Brown Shoe Co.; Hicks *v.*	901
Bryan, *In re*	956
Bryant, Inc.; White Buffalo Construction, Inc. *v.*	986
Brymer *v.* Hesson	954
Bubbel *v.* United States	976
Building Grievance Committee of O'Fallon; Wheeler *v.*	998
Bullis School, Inc.; Travers *v.*	931
Bunnell; Elgin *v.*	1007
Bunnell; Felix *v.*	1008
Bunnell; Smith *v.*	992
Burdine, *In re*	982
Burdine *v.* United States	995
Burgener; Gaunce *v.*	910
Burlington *v.* Dague	969
Burlington County Bridge Comm'n *v.* Laconis	901
Burney *v.* Ohio	960
Burson *v.* United States	997
Burton; Butler *v.*	922
Buscemi *v.* Maryland	1010
Bush; Farsaci *v.*	939
Bush; Wagner Seed Co. *v.*	970
Bustamente *v.* United States	996
Butler *v.* Burton	922
Butler; Patterson *v.*	990
Cabral Perez *v.* United States	942
Cahill *v.* Singletary	966
Cain; Cook *v.*	939
Cain *v.* Redman	922
Caine *v.* Hardy	936
Calderon *v.* United States	951
Calderone; United States *v.*	978
Caldwell *v.* Driscoll	989
Caldwell; Romero *v.*	993

	Page
Caldwell *v.* Texas	990
Calero *v.* United States	961
Calhoun *v.* United States	1003
California *v.* Cribas	951
California; Duncan *v.*	908
California; Fresquez *v.*	922
California; Hartford Fire Ins. Co. *v.*	933
California; Johnson *v.*	963
California; Jones *v.*	942
California; Kerr *v.*	991
California; Lopez *v.*	1003
California; Lucchesi *v.*	974
California; Medina *v.*	933
California; Merrett Underwriting Agency Management Ltd. *v.*	934
California; Mickle *v.*	988
California; Razo *v.*	974
California; Scott *v.*	977
California; Sully *v.*	944
California; Unionamerica Ins. Co. *v.*	934
California; Webster *v.*	1009
California; Wintherthur Reinsurance Corp. of America *v.*	934
California Electric Co. *v.* Briley	938
California Men's Colony, Unit II Men's Advisory Council; Rowland *v.*	905,934,1003
Californians for Citizen Government *v.* Legislature of Cal.	919
California State Bank; Stephen *v.*	992
Cameron Iron Works; Lavergne *v.*	937
Camoscio *v.* Rouse	914
Camp *v.* Wesch	954
Campagna *v.* United States	995
Campbell *v.* Dondero	983
Cano *v.* United States	948
Cantrell; Fite *v.*	1007
Cardin, *In re*	916
Carey *v.* United States	987
Carl Edwards & Sons Stables *v.* Department of Agriculture	937
Carlisle *v.* Bradshaw	960
Carlson; Herbage *v.*	991
Carmichael *v.* United States	1010
Carpenter *v.* United States	1008
Carr *v.* United States	965
Carrion-Caliz *v.* United States	965
Carroll *v.* United States	979
Carson *v.* Hernandez	974

	Page
Carson *v.* Peterson	990
Carter *v.* Barr	909
Carter *v.* United States	973
C-Art, Ltd.; Hong Kong Islands Line American, S. A. *v.*	1005
Cartwright *v.* White	963
Casazza; Illinois *v.*	919
Casella *v.* Morgan Hill	983
Casey *v.* Planned Parenthood of S. E. Pa.	933,957,981
Casey; Planned Parenthood of S. E. Pa. *v.*	933,957,981
Cashman; Covino *v.*	1007
Caspari *v.* McIntyre	978
Castillo *v.* New York	954
Castleberry; Cobin *v.*	999
Castro *v.* United States	994
Caterpillar, Inc.; Binkley *v.*	926
Caterpillar, Inc.; Schacht *v.*	926
Cavanaugh; Ingram *v.*	1012
Celotex Corp. *v.* Glasscock	1011
Central GMC, Inc. *v.* General Motors Corp.	907
Certain Underwriters at Lloyd's, London *v.* Independent Petrochemical Corp.	1011
Chagall *v.* Sobel	986
Chalk *v.* Harrison	953
Charlotte M.; Nancy B. *v.*	991
Chase *v.* United States	966
Chasmer *v.* United States	997
Chatz, *In re*	968
Chemical Waste Management, Inc. *v.* Hunt	957
Cherif *v.* United States	961
Chesapeake Western R. Co. *v.* Tax Comm'r, Va. Dept. of Taxation	966
Chesterton Co.; Das *v.*	982
Chestman *v.* United States	1004
Chewning *v.* Iowa	973
Chez Sez III Corp. *v.* Union Township	907
Chicago; Piotrowski *v.*	986
Chicago; Ryan *v.*	918
Children's Legal Foundation *v.* Action for Children's Television	913
Choice *v.* Beyer	967
Christoffel *v.* United States	996
Christopherson *v.* Allied-Signal Corp.	912
Chung Kun Yim *v.* Prelesnik	945
Church of Lukumi Babalu Aye, Inc. *v.* Hialeah	935
Church of Scientology of Cal. *v.* United States	905,934
Ciarkowski; Zhou *v.*	1008

Page
Cidlowski *v.* Office of Secretary of State of Cal. 989
Cincinnati *v.* Discovery Network, Inc. 918
Circuit Court for Vilas County; St. Germaine *v.* 997
City. See name of city.
Clark *v.* Collins 901
Clark; Montgomery *v.* 999
Clark *v.* Ocean Brand Tuna 973
Clark *v.* United States 996,1010
Clark; Wrenn *v.* 992
Clarke, *In re* 970
Clarke *v.* Clarke County 943
Clarke *v.* Loma Linda Foods, Inc. 917
Clarke County; Clarke *v.* 943
Clay *v.* Kentucky 923
Clements, *In re* 932
Clements Food Co.; Gibbs *v.* 991
Clemons *v.* Federal Deposit Ins. Corp. 906
Clinton *v.* Jeffers 930
Coastal Corp.; Willy *v.* 131
Cobin *v.* Castleberry 999
Cody; Johnson *v.* 973
Cohen *v.* South Carolina 942
Coleman *v.* CTI Logistics, Inc. 1010
Coleman *v.* Kopf 999
Coleman *v.* United States 972
Coleman *v.* Virginia 920
Coletti *v.* United States 920
Collins; Adam Cab Co. *v.* 960
Collins; Adam Cab, Inc. *v.* 960
Collins; Agomo *v.* 989
Collins; Clark *v.* 901
Collins; Ellis *v.* 915
Collins *v.* Harker Heights 115
Collins; Henry *v.* 944
Collins; McCullough *v.* 991
Collins; Megar *v.* 1000
Collins; Waggoner *v.* 946
Collins; White *v.* 1001
Collins; Wion *v.* 967
Colorado; Fleming *v.* 977
Colorado *v.* Marcellus 998
Colorado Libertarian Party *v.* Meyer 985
Columbia Pictures Industries, Inc.; Professional Real Estate Investors, Inc. *v.* 958

	Page
Commissioner; Accardo *v.*	907
Commissioner; Czarneski *v.*	983
Commissioner; Finkelman *v.*	919
Commissioner; Goos *v.*	940
Commissioner; INDOPCO, Inc. *v.*	79
Commissioner *v.* Soliman	935,969
Commissioner of Internal Revenue. See Commissioner.	
Commissioner of Revenue of Tenn.; Itel Containers Int'l Corp. *v.*	1002
Committee of Unsecured Creditors *v.* Mellon Bank, N. A.	937
Commonwealth. See name of Commonwealth.	
Community Redevelopment Agency of Los Angeles; Morgan *v.*	937
Concord Union School Dist.; Gadson *v.*	975
Confederated Tribes of Colville Reservation; Washington *v.*	997
Connecticut *v.* New Hampshire	1002
Connecticut Bank & Trust Co. *v.* Wilmington Trust Co.	966
Connecticut National Bank *v.* Germain	249
Conner, *In re*	956
Conner *v.* Indiana	946
Connor *v.* Mobil Chemical Co.	964
Connor *v.* United States	996
Conrad; Vorhauer *v.*	962
Conrail; Ray *v.*	927
Conroy *v.* Aniskoff	981
Consolidated Beef Industries, Inc. *v.* New York Life Ins. Co.	985
Consolidated Rail Corp. *v.* Eschberger	1011
Consolidated Rail Corp.; Ray *v.*	927
Consolidation Coal Co. *v.* Director, OWCP, Dept. of Labor	968
Continental Casualty Co. *v.* UNR Industries, Inc.	971
Cook *v.* Alexander	905
Cook *v.* Cain	939
Cook; Texas *v.*	998
Cook County; Soldal *v.*	918
Cooper *v.* United States	923
Cooper; Walls *v.*	1006
Cooper Electric Supply Co. *v.* Martin	936
Coral Construction Co. *v.* King County	927
Cordle *v.* Square D Co.	963
Corn *v.* United States	965
Corrections Commissioner. See name of commissioner.	
Cortec Industries, Inc. *v.* Westinghouse Credit Corp.	960
Cortland County *v.* United States	903,917
Cotofan; Cully *v.*	938
County. See name of county.	
Courier Journal & Louisville Times Co.; Barger *v.*	1006

	Page
Covillion *v.* Aetna Life & Casualty	922
Covington; Thompson *v.*	986
Covino *v.* Cashman	1007
Cowan *v.* Galley	965
Cowart's Estate *v.* Nicklos Drilling Co.	903,917
Cox, *In re*	935
Cox *v.* Alabama	987
Cox *v.* United States	921,996
Crabtree, *In re*	916
Cranfill *v.* United States	965
Crawford *v.* District of Columbia Bd. of Parole	990
Creasy; Shumate *v.*	999
Cribas; California *v.*	951
Crist; Osbond *v.*	1009
Crosby *v.* United States	905,934
Crosby *v.* Waldner	1007
Crosland *v.* South Carolina	1007
Crowley Towing & Transportation, Inc.; Middleton *v.*	1006
Crum *v.* United States	949
Cruz *v.* United States	942
Cruz Rasa *v.* United States	959
Csoka *v.* Walden	938
CSX Transportation, Inc. *v.* Easterwood	933
CSX Transportation, Inc.; Easterwood *v.*	933
CSX Transportation, Inc.; Holdiness *v.*	985
CTI Logistics, Inc.; Coleman *v.*	1010
Cuervo *v.* United States	994
Cuevas *v.* United States	955
Cullom *v.* United States	923
Cullum *v.* United States	999
Cully *v.* Cotofan	938
Cunningham, *In re*	956
Cunningham *v.* Peters	940
Cunningham *v.* Woodman	943
Curry *v.* Lockhart	988
Curtis *v.* Curtis	991
Curtius *v.* Merit Systems Protection Bd.	994
Cuyahoga County Court of Common Pleas; Market/Media Research, Inc. *v.*	987
Czarneski *v.* Commissioner	983
Dague; Burlington *v.*	969
Dakota Rail, Inc.; Ross *v.*	962
D'Albora, *In re*	980

	Page
Dallas County Child Protection Services Unit of Tex. Dept. of Human Services; Krasniqi *v.*	1006
Dallman; Stone *v.*	953
Damian *v.* Federal Express Corp.	914
Daniels; Pipefitters *v.*	951
Daniels *v.* United States	912
Darden; Nationwide Mut. Ins. Co. *v.*	318
Das *v.* A. W. Chesterton Co.	982
Datagate, Inc.; Hewlett-Packard Co. *v.*	984
Davenport *v.* United States	995
Davis, *In re*	980,982
Davis *v.* Hollis	938
Davis *v.* Jabe	910
Davis; Shelton *v.*	908
Davis *v.* Stone Container Corp.	927
Davis *v.* United States	908,921
Dawson *v.* Delaware	159
De'Albuquerque, *In re*	1004
Dean *v.* Homeowner's Repair Service	909
Dean *v.* Smith	909
Dean *v.* Veterans Administration	902
Deeb *v.* United States	975
DeFusco *v.* United States	997
DeGiovanni *v.* United States	1007
De Groote; Piron *v.*	967
DeKalb Bd. of Realtors, Inc. *v.* Fletcher L. Thompson Realty	903
DeKalb Bd. of Realtors, Inc. *v.* Thompson	903
Deland; Andrews *v.*	967
Delaware; Dawson *v.*	159
Delaware Court Officials; Richards *v.*	929
Delegal *v.* United States	997
De Leon *v.* United States	977
Delgado *v.* United States	965,995
Delmar Offshore, Inc.; Ortis *v.*	922
Delta Holdings, Inc. *v.* National Distillers & Chemical Corp.	985
Del Tufo *v.* Ivy Club	914
Demarest *v.* Manspeaker	921
Demos *v.* Supreme Court of Wash.	982,1003
Dempsey *v.* Massachusetts	977
De Nardo *v.* Anchorage	992
Dennis *v.* United States	920
Dennler *v.* Trippet	978,1003
Department of Agriculture; Carl Edwards & Sons Stables *v.*	937
Department of Agriculture; Edwards *v.*	937

Page
Department of Army; Bahr *v.* 909,999
Department of Commerce *v.* Montana 442,997
Department of Energy *v.* Ohio 607
Department of Energy; Ohio *v.* 607
Department of Health and Rehabilitative Services; Murray *v.* ... 911
Department of Housing and Urban Development; Abate *v.* 942
Department of Labor; Kent *v.* 915
Department of Navy; Jones *v.* 976
Department of Services for Children; Dixon *v.* 922
Department of State *v.* Ray 917
Department of Transportation; Kindig *v.* 955,967
Department of Veterans Affairs; Owens *v.* 911
Department Store Employees; Jones *v.* 989
Depew, *In re* 1004
Deputy Comm'r of State Correctional Institution at Huntingdon; Moore *v.* 949
DeRobertis *v.* Henderson 966
Derwinski; Johnson *v.* 990
Derwinski; Manfred *v.* 921
Derwinski; McFadden *v.* 947
Desert Palace, Inc.; Erickson *v.* 937
Devereux; Viehweg *v.* 927
Devine, *In re* 916
Dewey County Bank; Reinbold *v.* 946
Diamond; Swinick *v.* 911
Dias; Sky Chefs, Inc. *v.* 920
Diaz; Benavides *v.* 988
Diaz *v.* Terrell 947
Diaz-Reyes *v.* United States 911
Diggs; Miller *v.* 999
Dill *v.* Love 943
Dillon *v.* Houston Chronicle Publishing Co. 1008
Director, Division of Taxation; Allied-Signal, Inc. *v.* 928,969,1002
Director, Office of Thrift Supervision; Franklin Savings Assn. *v.* 937
Director, OWCP, Dept. of Labor; Bath Iron Works *v.* 935
Director, OWCP, Dept. of Labor; Consolidation Coal Co. *v.* 968
Director of penal or correctional institution. See name or title of director.
Discovery Network, Inc.; Cincinnati *v.* 918
Dismuke *v.* United States 976
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
District of Columbia *v.* Greater Washington Bd. of Trade 970,1003
District of Columbia Bd. of Parole; Crawford *v.* 990

	Page
Dittmer; Utesch *v.*	1006
Dixon *v.* Department of Services for Children	922
Dixon *v.* United States	966
Dixon; United States *v.*	1004
Dixon-Bookman; Jackson *v.*	999
Doe *v.* Gross	950
Doerr *v.* Emerson	990
Doescher *v.* Washington	974
Doherty *v.* Barr	901
Domby *v.* United States	990
Donahue *v.* United States	976
Dondero; Campbell *v.*	983
Donnelly *v.* United States	994
Donner *v.* Appalachian Ins. Co.	984
Donovan *v.* United States	941
Doreste *v.* United States	1007
Dorsey; Zepeda *v.*	948
Douglas County; Schwarzer *v.*	960
Dow Chemical Co.; Jackson *v.*	922
Drilake Farms, Inc. *v.* Surrillo	981
Driscoll; Caldwell *v.*	989
Duckworth; McGill *v.*	907
Dugger; Francois *v.*	945
Duke *v.* Staggers	1007
Duncan *v.* California	908
Dunn, *In re*	968
Dunn *v.* Missouri	992
Dunnick *v.* United States	941
Dunson *v.* United States	941
DuPage County; Mitran *v.*	974
Du Pont de Nemours & Co.; Bradley *v.*	998
Dupree *v.* Moore	930
Duren *v.* Alabama	974
Easley *v.* Southern Shipbuilding Corp.	930
East Ala. Health Care Authority *v.* Auburn Medical Center, Inc.	936
East Ala. Medical Center *v.* Auburn Medical Center, Inc.	936
Easterwood *v.* CSX Transportation, Inc.	933
Easterwood; CSX Transportation, Inc. *v.*	933
Eatherly *v.* Smith County	1005
Echols *v.* United States	912
Eddmonds *v.* Illinois	942
Edwards *v.* Department of Agriculture	937
Edwards & Sons Stables *v.* Department of Agriculture	937
E. F. Hutton & Co.; George James Platsis, P. C. *v.*	984

Page
Eichleay Corp. *v.* Iron Workers 915
Eicoff *v.* United States 995
E. I. du Pont de Nemours & Co.; Bradley *v.* 998
Elder *v.* Hahn 922
Elfreeze *v.* Neal 993
Elgin *v.* Bunnell 1007
Ellerbe; Warner *v.* 908
Elliott, *In re* 982
Elliott *v.* United States 996
Ellis *v.* Collins 915
Ellis *v.* Texas 915
El Paso County; N. S. *v.* 943
Emerson; Doerr *v.* 990
Emison; Growe *v.* 928,958
Employees of Butte, Anaconda & Pacific R. Co. *v.* United States 936
Emporia *v.* Renfro 915
Engelke *v.* Scher 952
Eno *v.* United States 928
Enright *v.* Rosebud County 974
Environmental Protection Agency *v.* Oklahoma 91
Erickson *v.* Desert Palace, Inc. 937
Eschberger; Consolidated Rail Corp. *v.* 1011
Escolastico-Disla *v.* United States 942
Escondido; Yee *v.* 519
Estate. See name of estate. 903
Estelle; Washington *v.* 1008
Estlack; Smith *v.* 1007
Eu; Legislature of State of Cal. *v.* 919
Evans *v.* Northwest Airlines, Inc. 907
Evening News Assn.; Locricchio *v.* 907
Evonuk *v.* Shekell 986
Exxon Corp.; Walker *v.* 954
Fairchild *v.* Pacific Maritime Assn. 984
Fairman *v.* United States 947
Fant *v.* Turner 963
Farrar *v.* Hobby 1003
Farris *v.* Texas 911
Farsaci *v.* Bush 939
Faulkner *v.* Pennsylvania 989
Fauls *v.* United States 988
Featherson *v.* United States 1009
Federal Aviation Administration; San Francisco *v.* 983
FCC *v.* Action for Children's Television 914
Federal Deposit Ins. Corp.; Clemons *v.* 906

	Page
Federal Express Corp.; Damian *v.*	914
Feige, *In re*	932
Feldman *v.* Glucroft	960
Felix *v.* Bunnell	1008
Felix; Maxie *v.*	918
Felix; United States *v.*	378
Ferguson *v.* Giant Foods, Inc.	954
Ferguson *v.* United States	946
Ferris *v.* Kass	909
Finkelman *v.* Commissioner	919
First Catholic Slovak Union of U. S. and Canada; Putka *v.*	986
First Island Industry, Inc.; Taitague *v.*	936
First National Bank; Barnes *v.*	999
First National Bank of Atlanta; Moister *v.*	944
Fisher *v.* Alabama	941
Fite *v.* Cantrell	1007
Fitzgerald *v.* Thompson	999
Flanagan *v.* Nevada	931
Fleming *v.* Colorado	977
Fletcher L. Thompson Realty; DeKalb Bd. of Realtors, Inc. *v.*	903
Flint; Schwartz *v.*	961
Flores; Barr *v.*	905
Florian *v.* LeFevre	910
Florida; Bedford *v.*	1009
Florida; Bowden *v.*	975
Florida; Grant *v.*	992
Florida; Middleton *v.*	1009
Florida; Moore *v.*	943
Florida; Parker *v.*	912
Florida; Savage *v.*	943
Florida; Schmitt *v.*	964
Florida; Sireci *v.*	946
Florida; Stewart *v.*	976
Florida; Yanke *v.*	973
Florida; Young *v.*	999
Flynn *v.* United States	996
Flynt *v.* Spence	984
Ford Motor Co.; Boyd *v.*	939
Forrester; Sun *v.*	921,999
Forsyth County *v.* Nationalist Movement	933,957
Foster *v.* Georgia	921
Foster *v.* Rutgers	906
Foust; Northern Arapaho Tribe of Wind River Reservation *v.*	984
Fowler; Brignoli *v.*	971

Page

Fowler *v.* United States 949
Fox, *In re* 902,1001
Fraley *v.* United States 942
Francois *v.* Dugger 945
Francois *v.* United States 993
Franklin *v.* Gwinnett County Public Schools 60
Franklin *v.* Massachusetts 929,954,981
Franklin; Massachusetts *v.* 969
Franklin National Bank; Hecker *v.* 937
Franklin Savings Assn. *v.* Director, Office of Thrift Supervision . 937
Franzen *v.* Wright 944
Fraternal Order of Police, Lodge No. 5 *v.* Philadelphia 984
Frazer, *In re* 902
Frazier *v.* Ohio 941
Freas *v.* New Jersey 979
Freeland & Kronz; Taylor *v.* 638
Freelove *v.* United States 976
Freeman *v.* Pitts 467
Freeman *v.* Whitley 973
French *v.* Runda 1008
Fresquez *v.* California 922
Friedman, *In re* 932
Frierson *v.* United States 952
Front Royal; Front Royal & Warren County Ind. Park Corp. *v.* .. 937
Front Royal & Warren County Ind. Park Corp. *v.* Front Royal .. 937
Fulcomer; Goldblum *v.* 1005
Fulcomer; Reese *v.* 988
Fulcomer; Todaro *v.* 909
Funk *v.* Loyalty Enterprises, Ltd. 909
Funkhouser *v.* Saffle 990
Funnell *v.* Martin 906
G. *v.* United States 1010
Gade *v.* National Solid Wastes Management Assn. 917
Gadson *v.* Concord Union School Dist. 975
GAF Corp.; Shriver *v.* 987
Galbraith *v.* Northern Telecom, Inc. 945
Gale *v.* United States 923
Gallardo *v.* United States 923
Galley; Cowan *v.* 965
Gambino; United States *v.* 978
Gamble *v.* Webster 974
Garamendi; Hassneh Ins. Co. of Israel, Ltd. *v.* 940
Garcia *v.* United States 920
Gargallo *v.* Quick & Reilly Clearing Corp. 927

	Page
Garner, *In re*	903
Garner *v.* United States	1010
Garrett; Von Croney *v.*	927
Garrick, *In re*	932
Garrison *v.* Tansy	1007
Gates, *In re*	958
Gattsek, *In re*	980
Gaub *v.* Richard Soong & Co. (USA)	971
Gaunce *v.* Burgener	910
Gaydos *v.* Gaydos	979
General Motors Corp.; Central GMC, Inc. *v.*	907
General Motors Corp. *v.* Romein	181
General Public Utilities Corp.; Gumby *v.*	906
George *v.* Government of Virgin Islands	1009
George *v.* Virginia	973
George James Platsis, P. C. *v.* E. F. Hutton & Co.	984
Georgia; Brooks *v.*	910
Georgia; Foster *v.*	921
Georgia; Gibson *v.*	999
Georgia; Giles *v.*	962
Georgia; Miller *v.*	928
Georgia; Wade *v.*	953
Georgia; Williams *v.*	999
Germain; Connecticut National Bank *v.*	249
Giant Foods, Inc.; Ferguson *v.*	954
Gibbs *v.* Clements Food Co.	991
Gibson *v.* Georgia	999
Gibson *v.* United States	941
Gilbert *v.* United States	949
Gilbertson *v.* Graham	934
Giles, *In re*	905
Giles *v.* Georgia	962
Giles *v.* United States	949
Gill *v.* Virginia	1008
Gipson; Smyth *v.*	971
Girling Health Systems, Inc. *v.* United States	940
Glasscock; Celotex Corp. *v.*	1011
Glucroft; Feldman *v.*	960
Gnatovich *v.* Ohio	919
Goldblum *v.* Fulcomer	1005
Golden *v.* Morris	1007
Goldstein *v.* United States	994
Gomez *v.* McKinney	932
Gomez *v.* United States	947,966

	Page
Gomez *v.* U. S. District Court	653
Gonzalez-Calas *v.* United States	943
Goodman & Co. *v.* United States	970
Goodwin *v.* United States	906
Goos *v.* Commissioner	940
Gordon *v.* Board of Zoning Appeals, Carroll County	960
Gould, Inc.; Pechiney & Trefimetaux *v.*	978
Government of Guam; Blas *v.*	920
Government of Virgin Islands; George *v.*	1009
Governor of Ala.; Chemical Waste Management, Inc. *v.*	957
Governor of Ark. *v.* Jeffers	930
Governor of Ohio *v.* Quilter	979
Governor of Pa. *v.* Planned Parenthood of S. E. Pa.	933,957,981
Governor of Pa.; Planned Parenthood of S. E. Pa. *v.*	933,957,981
Governor of Tex. *v.* Terrazas	957
Grable *v.* United States	987
Grady *v.* United States	973
Graham; Gilbertson *v.*	934
Grant *v.* Florida	992
Grant *v.* United States	977
Gray *v.* Silva	1008
Greater Washington Bd. of Trade; District of Columbia *v.*	970,1003
Green *v.* Jones	989
Green *v.* Pennsylvania	964
Green; Smythe *v.*	953
Green *v.* South Carolina	962
Green *v.* United States	1010
Greenberg *v.* H & H Music Co.	958
Greene *v.* Senkowski	950
Greene *v.* Teledyne Electronics	954
Greenville Public School Dist. *v.* Western Line Consol. School Dist.	950
Grievance Comm., Second and Eleventh Jud. Districts; Mirman *v.*	960
Griffey *v.* United States	936
Grimes *v.* Wells	963
Groseclose *v.* McWilliams	1006
Groseclose *v.* Tennessee	1006
Gross; Doe *v.*	950
Growe *v.* Emison	928,958
Grunden *v.* United States	949
Grunst *v.* United States	914
Guajardo *v.* United States	1009
Guam; Blas *v.*	920
Guevara; United States *v.*	977
Gumby *v.* General Public Utilities Corp.	906

	Page
Gunter *v.* Abdullah	955
Gunter; Huckleberry *v.*	990
Guthrie *v.* Tifco Industries, Inc.	908
Gwinnett County Public Schools; Franklin *v.*	60
Hadley *v.* United States	905,958
Hahn; Elder *v.*	922
Haidar *v.* United States	972
Haitian Centers Council, Inc.; McNary *v.*	1000
Halas *v.* Quigg	955,1001
Hale; Harris *v.*	971
Halford *v.* United States	996
Hamilton *v.* Air Jamaica, Ltd.	938
Hamilton; Union Oil Co. of Cal. *v.*	1005
Hampton *v.* United States	973
Hancock Cos.; Mouradian *v.*	951
Hanley *v.* United States	1011
Hansen, *In re*	980
Hanus *v.* Sodoro, Daly & Sodoro Law Firm	972
Hardin *v.* United States	976
Harding *v.* Lewis	968
Harding; Lewis *v.*	967
Harding *v.* Redman	944
Hardy; Caine *v.*	936
Hardy *v.* LeCureux	946
Harker Heights; Collins *v.*	115
Harper *v.* United States	948
Harris; Abraham *v.*	952
Harris *v.* Hale	971
Harris *v.* Oklahoma	943
Harris *v.* Sivley	946
Harris *v.* Vasquez	910
Harris; Vasquez *v.*	1000
Harrison, *In re*	980,982
Harrison; Chalk *v.*	953
Harrison *v.* United States	948
Hart, *In re*	956
Hartford Fire Ins. Co. *v.* California	933
Harwood *v.* Partredereit af. 15.5.81	907
Hassneh Ins. Co. of Israel, Ltd. *v.* Garamendi	940
Hassneh Ins. Co. of Israel, Ltd. *v.* Superior Court of Cal., Los Angeles County	940
Hastings *v.* United States	975
Hatteras Yacht; Villa Marina Yacht Sales, Inc. *v.*	986
Havasupai Tribe *v.* United States	959

	Page
Hawaii; Price *v.*	938
Hawkins *v.* United States	976
Hawley; Samuels *v.*	948
Hayes *v.* United States	994
Head *v.* Thornburg	904
Health Employees *v.* National Labor Relations Bd.	950
Hecker *v.* Franklin National Bank	937
Heggy *v.* Heggy	951
Helart; Del Raine *v.*	1009
Henderson *v.* Alabama	908
Henderson; DeRobertis *v.*	966
Henderson *v.* United States	1007
Henry *v.* Collins	944
Henry *v.* Maryland	972
Henry *v.* United States	997
Henshaw *v.* Immigration and Naturalization Service	994
Henthorn *v.* United States	972
Herbage *v.* Carlson	991
Herman *v.* Page	986
Hernandez; Carson *v.*	974
Hernandez *v.* United States	948
Herrera *v.* United States	972,975
Herring; Young *v.*	940
Hesse; Richardson *v.*	1008
Hesson; Brymer *v.*	954
Hester *v.* United States	940
Hewlett-Packard Co. *v.* Datagate, Inc.	984
Hewlett-Packard Co.; HyPoint Technology, Inc. *v.*	938
H & H Music Co.; Greenberg *v.*	958
Hialeah; Church of Lukumi Babalu Aye, Inc. *v.*	935
Hicks *v.* Brown Group, Inc.	901
Hicks *v.* Brown Shoe Co.	901
Hiersche *v.* United States	923
Hill; United States *v.*	1004
Hilling *v.* United States	987
Hines; Brandon Steel Decks, Inc. *v.*	971
Hinges *v.* United States	911
Hintze *v.* Southwest Gas Inc.	965
Hoai *v.* Thanh Van Vo	967
Hoang *v.* Sims	986
Hobby; Farrar *v.*	1003
Hofmann *v.* Pressman Toy Corp.	963
Hoke; Lawrence *v.*	964
Holdiness *v.* CSX Transportation, Inc.	985

	Page
Holland *v.* United States	928
Hollis; Davis *v.*	938
Hollis *v.* Texas	992
Holman *v.* O'Leary	943
Holmes *v.* Securities Investor Protection Corp.	258
Holywell Corp. *v.* Smith	47
Homebuilders Assn. of Bucks/Montgomery Counties *v.* Trappe	986
Homeowner's Repair Service; Dean *v.*	909
Hong Kong Islands Line American, S. A. *v.* C-Art, Ltd.	1005
Hooper *v.* Alabama	920
Horowitz, *In re*	968
Horton; Zant *v.*	952
Hospital Corp. of America *v.* United States	906
Houston Chronicle Publishing Co.; Dillon *v.*	1008
Houston Lighting & Power Co. *v.* Morris	938
Houston Lighting & Power Co. *v.* San Antonio	938
Howard *v.* Zimmerman	944
Hoyos *v.* United States	975
Huckleberry *v.* Gunter	990
Huckleberry House; Keyes *v.*	922,962
Huddleston; Itel Containers International Corp. *v.*	1002
Hudson *v.* McMillian	1
Huffsmith *v.* Wyoming County Prison Bd.	946
Hughes *v.* United States	994
Human Development Assn. *v.* National Labor Relations Bd.	950
Hunt; Chemical Waste Management, Inc. *v.*	957
Hunter *v.* Lindler	911
Hunter *v.* Roberts	945
Hurlburt *v.* New Hampshire	1008
Hutton & Co.; George James Platsis, P. C. *v.*	984
HyPoint Technology, Inc. *v.* Hewlett-Packard Co.	938
Idaho; Pizzuto *v.*	908
Idziak *v.* Michigan	944
Illinois; Boclair *v.*	962
Illinois; Brown *v.*	999
Illinois *v.* Casazza	919
Illinois; Eddmonds *v.*	942
Illinois; Jones *v.*	974
Illinois *v.* Kelk	930
Illinois *v.* Krueger	919
Illinois; Lendabarker *v.*	960
Illinois; Pecoraro *v.*	999
Illinois; Ramirez *v.*	912

Page

Illinois State Bd. of Ed. *v.* Board of Ed. of Community Consolidated School Dist. No. 21 934
Illinois State Bd. of Ed.; Board of Ed. of Community Consolidated School Dist. No. 21 *v.* 934
Imlay; Montana *v.* 905
Immigration and Naturalization Service; Henshaw *v.* 994
Immigration and Naturalization Service; McBride *v.* 959
Immigration and Naturalization Service; Ogunleye *v.* 942
Independent Petrochemical Corp.; Certain Underwriters at Lloyd's, London *v.* 1011
Indiana; Ashba *v.* 1007
Indiana; Conner *v.* 946
Indiana; Kennedy *v.* 921
Indiana; Lock *v.* 991
Indiana; Masuth *v.* 963
INDOPCO, Inc. *v.* Commissioner 79
Ingalls *v.* Roosevelt County 982
Ingle; Newcomb *v.* 915
Ingram *v.* Cavanaugh 1012
In re. See name of party.
Interinsurance Exchange of Auto. Club of Southern Cal.; McGee *v.* 971
Internal Revenue Service; Swingler *v.* 1009
International. For labor union, see name of trade.
International Chemical Co. *v.* National Labor Relations Bd. 959
International Eateries of America, Inc. *v.* Broward County 920
International Multi-Services *v.* United States 964
International Paper Co.; Russ *v.* 987
International Society for Krishna Consciousness, Inc. *v.* Lee ... 903,933
International Society for Krishna Consciousness, Inc.; Lee *v.* ... 903,933
Interstate Commerce Comm'n; B. J. Alan Co. *v.* 1004
Interstate Commerce Comm'n *v.* Boston & Maine Corp. 407
Interstate Commerce Comm'n; Rives *v.* 959
Iowa; Baccam *v.* 962
Iowa; Chewning *v.* 973
Iowa Dept. of Revenue and Finance; Kraft General Foods, Inc. *v.* 932
Irby *v.* United States 939
Iron Workers; Eichleay Corp. *v.* 915
Ironworkers of Western Pa. Benefits Plans; Klavonick *v.* 939
Irwin *v.* United States 965
ISCA Enterprises *v.* New York City 906
Itel Containers International Corp. *v.* Huddleston 1002
Ivy Club; Del Tufo *v.* 914
Jabe; Davis *v.* 910
Jackson *v.* Dixon-Bookman 999

	Page
Jackson *v.* Dow Chemical Co.	922
Jackson; Rapps *v.*	960
Jackson *v.* United States	911,995
Jacobs *v.* Supreme Court of Mo.	920,999
Jacobson *v.* United States	540
Jago; Pariseau *v.*	910
Jama Construction Corp. *v.* Los Angeles	919
James; Moore *v.*	963
James *v.* United States	908
J. Arlie Bryant, Inc.; White Buffalo Construction, Inc. *v.*	986
Jarvi, *In re*	982
Jauregui *v.* United States	961
J. E. B. *v.* Wisconsin	940
Jefferies *v.* South Carolina	931
Jeffers; Clinton *v.*	930
Jeffress *v.* Jeffress	961
Jeffress *v.* Peterson	989
Jenkins *v.* United States	975
Jermosen *v.* Smith	962
Jesse, *In re*	944
John *v.* North Community Bank	979
John Hancock Cos.; Mouradian *v.*	951
Johns, *In re*	935
Johnson; Barnhill *v.*	393
Johnson *v.* California	963
Johnson *v.* Cody	973
Johnson *v.* Derwinski	990
Johnson *v.* Johnson	927
Johnson; Lucien *v.*	945
Johnson *v.* Michigan	999
Johnson *v.* Michigan Dept. of Corrections	1008
Johnson *v.* Monterey County	974
Johnson *v.* Singletary	992
Johnson *v.* South Carolina	993
Johnson *v.* United States	915,950
Jones *v.* California	942
Jones *v.* Department of Navy	976
Jones *v.* Department Store Employees	989
Jones; Green *v.*	989
Jones *v.* Illinois	974
Jones *v.* Murray	973
Jones *v.* Puckett	999
Jones *v.* United States	936,1009
Jones; Usher *v.*	909

	Page
Jordan *v.* Singletary	964
Joseph *v.* United States	976
Joubert *v.* Nebraska	918
Jozwiak *v.* United States	950
Judge, Second Judicial Court; Ferris *v.*	909
Judge, Superior Court of Douglas County; Moore *v.*	963
Justice *v.* LTV Steel Co.	946
Kalan Inc. *v.* United States	906
Kallestead; Meyers *v.*	920
Kaltenbach, *In re*	905
Kaltenbach *v.* Stalder	963
Kaltenbach *v.* Whitley	961
Kansas; Barker *v.*	594
Kansas; Messer *v.*	910
Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax; Wilson *v.*	959
Kashif *v.* United States	975
Kass; Ferris *v.*	909
Kattula *v.* United States	904,961
Kegley *v.* United States	959
Keisling; Republican Party of Ore. *v.*	970
Kelk; Illinois *v.*	930
Kelly *v.* United States	941
Kemp *v.* Singletary	1010
Kennedy *v.* Indiana	921
Kennedy *v.* Singletary	953,1012
Kennedy *v.* United States	947
Kenney, *In re*	902,932
Kent *v.* Department of Labor	915
Kentucky; Clay *v.*	923
Kentucky; Miles *v.*	977
Kentucky; Randle *v.*	988
Kerr *v.* California	991
Kerr; McAllan *v.*	939
Kersh; McCullough *v.*	991
Keyes *v.* Huckleberry House	922,962
Keyes *v.* McIssac	962
Khan *v.* Tanner	942
Kiba *v.* United States	1010
Kidwell *v.* Transportation Communications Union	1005
Kimes *v.* United States	936
Kinard *v.* United States	1011
Kinder *v.* United States	987
Kindig *v.* Department of Transportation	955,967
King *v.* Palmer	918

	Page
King *v.* United States	996
King County; Coral Construction Co. *v.*	927
Kiser *v.* United States	983
Klavonick *v.* Ironworkers of Western Pa. Benefits Plans	939
Klein *v.* Borg	1008
Klineburger *v.* Maritrans Operating Partners L. P.	1005
Kmart Corp.; Arnold *v.*	975
Kochekian *v.* United States	931
Koonce *v.* United States	994
Koonce; United States *v.*	998
Kopf; Coleman *v.*	999
Kraft General Foods, Inc. *v.* Iowa Dept. of Revenue and Finance	932
Kramer, *In re*	902,1002
Krasniqi *v.* Dallas County Child Protection Services Unit of Tex. Dept. of Human Services	1006
Kros, *In re*	931
Krueger; Illinois *v.*	919
Kulzer *v.* Owens-Corning Fiberglas Corp.	939
Kun Yim *v.* Prelesnik	945
Kutsko *v.* Kutsko	907
Kutsko *v.* Superior Court of Cal., San Francisco County	907
Labor Union. See name of trade.	
Lac d'Amiante du Quebec, Ltee *v.* Stanek	977
Lachterman *v.* Missouri	983
Laconis; Burlington County Bridge Comm'n *v.*	901
Ladner *v.* Smith	983
Laguna; Shearson Lehman Mortgage Corp. *v.*	966
Lake at Las Vegas Investors Group *v.* Transcontinental Corp.	920
Lake Country, Inc. *v.* Olsen	972
Lake County Superior Court; Wilkerson *v.*	959
Lambdin; Paschal *v.*	993
Lange *v.* United States	966
Langford *v.* United States	960
Langston; Southwestern Bell Telephone Co. *v.*	914
Langston *v.* United States	995
Larner *v.* Wyman	990
LaSalle *v.* Warden, Ossining Facility	993
Las Vegas; Patillo *v.*	963
Laureano *v.* Sullivan	999
Lavergne *v.* Cameron Iron Works	937
Lawrence *v.* Hoke	964
Lawrence *v.* United States	972,997,1011
Lawson *v.* Lewis	911
Lawson *v.* United States	948

Page
Leapley; McCafferty *v.* ... 911
LeCureux; Hardy *v.* ... 946
Ledford *v.* United States ... 975
Lee, *In re* ... 935
Lee *v.* International Society for Krishna Consciousness, Inc. ... 903,933
Lee; International Society for Krishna Consciousness, Inc. *v.* ... 903,933
Lee; Newport *v.* ... 959
Lee *v.* Walgreen's Co. ... 963
LeFevre; Florian *v.* ... 910
Legislature of State of Cal.; Californians for Citizen Government *v.* 919
Legislature of State of Cal. *v.* Eu ... 919
Lendabarker *v.* Illinois ... 960
Leuro Rosas *v.* United States ... 975
Lewis *v.* Harding ... 967
Lewis; Harding *v.* ... 968
Lewis; Lawson *v.* ... 911
Lewis; Richmond *v.* ... 958
Lewis *v.* Russe ... 921
Lewis *v.* Texas ... 920
Liberty Mut. Fire Ins. Co.; Richards *v.* ... 1004
Lin *v.* Securities and Exchange Comm'n ... 907
Lindler; Hunter *v.* ... 911
Little Forest Medical Center of Akron *v.* Ohio Civil Rights Comm'n 906
Litton Microwave Cooking Products, Division of Litton Systems, Inc. *v.* NLRB ... 985
Lloyd *v.* United States ... 996
Local. For labor union, see name of trade.
Lock *v.* Indiana ... 991
Lockhart; Curry *v.* ... 988
Locricchio *v.* Evening News Assn. ... 907
Loma Linda Foods, Inc.; Clarke *v.* ... 917
Lombard *v.* New York City Bd. of Ed. ... 953
Longbehn *v.* United States ... 975
Lopez *v.* California ... 1003
Lopez *v.* United States ... 996
Lopez Jauregui *v.* United States ... 961
Los Angeles; Jama Construction Corp. *v.* ... 919
Los Angeles; Westbrook *v.* ... 991
Los Angeles County Sheriff's Dept.; Maurer *v.* ... 921
Louisiana; Mississippi *v.* ... 935
Louisiana; Shubbie *v.* ... 993
Louisiana; Widenhouse *v.* ... 910
Louisiana State Bd. of Dentistry; Allen *v.* ... 1006
Louisiana State Penitentiary; Williams *v.* ... 990

	Page
Love; Dill *v.*	943
Love; Tucker *v.*	943
Love *v.* United States	973
Lovings *v.* Virginia	946
Lowe *v.* United States	946
Lowry *v.* United States	961
Loyalty Enterprises, Ltd.; Funk *v.*	909
LTV Steel Co.; Justice *v.*	946
Lucas *v.* United States	989
Lucchesi *v.* California	974
Lucien *v.* Johnson	945
Lucien *v.* Peters	945
Lucien *v.* Roper	945
Luna-Peralta *v.* United States	996
Lynaugh; Smith *v.*	944
M.; Nancy B. *v.*	991
M.; Suter *v.*	347
Mabery *v.* Rodriguez	993
Mackey *v.* United States	997
Madigan; McCarthy *v.*	140
Madison Cablevision, Inc. *v.* Morgantown	985
Maise *v.* United States	974
Malone *v.* United States	948
Malumphy *v.* Arizona	991
Manfred *v.* Derwinski	921
Manning; South Carolina *v.*	914
Manspeaker; Demarest *v.*	921
Marcellus; Colorado *v.*	998
Marin, *In re*	905
Marin *v.* Brigham Young Univ.	946
Marino *v.* United States	1009
Market/Media Research, Inc. *v.* Cuyahoga County Court of Common Pleas	987
Marquardt, *In re*	902
Marshall *v.* Salton	964
Martin, *In re*	935
Martin; Cooper Electric Supply Co. *v.*	936
Martin; Funnell *v.*	906
Martin *v.* Singletary	1009
Martin *v.* United States	973,988
Martinez *v.* United States	994
Martins Operating Partners L. P.; Klineburger *v.*	1005
Marx *v.* United States	939
Maryland; Buscemi *v.*	1010

	Page
Maryland; Henry *v.*	972
Maryland; Wiggins *v.*	1007
Mason; Michigan *v.*	914
Massachusetts; Dempsey *v.*	977
Massachusetts *v.* Franklin	969
Massachusetts; Franklin *v.*	929,954,981
Massachusetts Ed. Assn.; Belhumeur *v.*	1004
Massey *v.* United States	965
Masuth *v.* Indiana	963
Mata *v.* United States	949
Mateo *v.* United States	996
Mattina; Shelton *v.*	909
Maui Loa; Paty *v.*	938
Maurer *v.* Los Angeles County Sheriff's Dept.	921
Maxie *v.* Felix	918
Maya *v.* United States	950
Mazurkiewicz; Balsamo *v.*	993
McAllan *v.* Kerr	939
McBride *v.* Immigration and Naturalization Service	959
McCafferty *v.* Leapley	911
McCarthy *v.* Madigan	140
McClellan; Petillo *v.*	945
McCullough *v.* Collins	991
McCullough *v.* Kersh	991
McDonald *v.* United States	984
McDonald *v.* Yellow Cab Metro, Inc.	982
McFadden *v.* Derwinski	947
McGee *v.* Interinsurance Exchange of Auto. Club of Southern Cal.	971
McGill *v.* Duckworth	907
McGinnis *v.* Sweeton	926
McIntosh *v.* United States	995
McIntyre; Caspari *v.*	978
McIssac; Keyes *v.*	962
McKinney; Gomez *v.*	932
McKinney *v.* Singletary	922
McLean *v.* United States	1010
McMackin; Starks *v.*	944
McMackin; Yates *v.*	990
McMillian; Hudson *v.*	1
McNamee, *In re*	968
McNary *v.* Haitian Centers Council, Inc.	1000
McQuillan; Spectrum Sports, Inc. *v.*	958
McWilliams; Groseclose *v.*	1006
Meachum; Savenelli *v.*	1011

	Page
Meade, *In re*	935
Medina *v.* California	933
Medina *v.* United States	921
Medley *v.* United States	936
Meese; Penthouse International, Ltd. *v.*	950
Megar *v.* Collins	1000
Mekas, *In re*	956
Mellon Bank, N. A.; Committee of Unsecured Creditors *v.*	937
Mendes *v.* United States	977
Mendez *v.* United States	945
Merchant *v.* Singletary	963
Merit Systems Protection Bd.; Curtius *v.*	994
Merit Systems Protection Bd.; Soehngen *v.*	939
Merrett Underwriting Agency Management Ltd. *v.* California	934
Merriman *v.* Bossier Parish Sheriff's Dept.	993
Messer *v.* Kansas	910
Messing *v.* Mostoller	971
Metallo *v.* United States	940
Metcalf & Eddy, Inc.; Puerto Rico Aqueduct and Sewer Authority *v.*	918,957,1002
Meyer; Colorado Libertarian Party *v.*	985
Meyer *v.* Meyer	993
Meyer *v.* United States	919
Meyers *v.* Bette Mom's Tavern	920
Meyers *v.* Kallestead	920
Meyers *v.* United States	994
Michigan; Idziak *v.*	944
Michigan; Johnson *v.*	999
Michigan *v.* Mason	914
Michigan Dept. of Corrections; Johnson *v.*	1008
Michigan Employment Security Comm'n *v.* Wolverine Radio Co.	978
Mickle *v.* California	988
Middleton *v.* Crowley Towing & Transportation, Inc.	1006
Middleton *v.* Florida	1009
Midler *v.* Young & Rubicam, Inc.	951
Midler; Young & Rubicam, Inc. *v.*	951
Midnight Sessions, Ltd. *v.* Philadelphia	984
Miles *v.* Kentucky	977
Milgram; Patel *v.*	987
Miller *v.* Diggs	999
Miller *v.* Georgia	928
Miller; Ohio *v.*	998
Miller *v.* United States	912,947
Mine Workers *v.* New Beckley Mining Corp.	971

	Page
Minicone *v.* United States	950
Minnesota; Steele *v.*	922
Minnick *v.* United States	995
Minniefield *v.* Perkins	916
Minota-Guerrero *v.* United States	947
Mirabal *v.* United States	987
Mirman *v.* Grievance Comm., Second and Eleventh Jud. Districts	960
Mississippi; Bevill *v.*	942
Mississippi *v.* Louisiana	935
Missouri; Dunn *v.*	992
Missouri; Lachterman *v.*	983
Missouri; Shaw *v.*	910
Missouri Pacific R. Co.; Railroad Comm'n of Tex. *v.*	1003
Mitchell *v.* Mobil Oil Corp.	938
Mitchell *v.* Renfro	910
Mitchell *v.* United States	923,1010
Mitran *v.* DuPage County	974
Mobil Chemical Co.; Connor *v.*	964
Mobil Oil Corp.; Mitchell *v.*	938
Mody; Tabrizian *v.*	972
Moister *v.* First National Bank of Atlanta	944
Molina *v.* Strickrath	990
Molina-Cuartas *v.* United States	995
Monroe *v.* United States	971
Montana; Department of Commerce *v.*	442,997
Montana *v.* Imlay	905
Monterey County; Johnson *v.*	974
Monterey County; Richardson *v.*	974
Montgomery *v.* Clark	999
Montgomery *v.* University of Chicago	944
Moody *v.* Smith	960
Moore *v.* Barr	911
Moore *v.* Deputy Comm'r, State Correctional Institution, Huntingdon	949
Moore; Dupree *v.*	930
Moore *v.* Florida	943
Moore *v.* James	963
Moore *v.* Nevada	930
Moore *v.* O'Malley	967
Mooyman *v.* Workmen's Compensation Appeal Bd.	982
Morales *v.* Ohio	974
Moreno *v.* United States	948
Morgan; Boston Teachers *v.*	983
Morgan *v.* Community Redevelopment Agency of Los Angeles	937

Page

Morgan *v.* South Carolina 963
Morgan Hill; Casella *v.* 983
Morgantown; Madison Cablevision, Inc. *v.* 985
Morgenthau *v.* Randall 972
Morris; Golden *v.* 1007
Morris; Houston Lighting & Power Co. *v.* 938
Morris *v.* University of Ark. 999
Mosco *v.* United States 941
Mostoller; Messing *v.* 971
Mount *v.* United States 953
Mouradian *v.* John Hancock Cos. 951
Muldrow, *In re* 1002
Munera-Cadavid *v.* United States 983
Muracciole *v.* United States 949
Murray *v.* Department of Health and Rehabilitative Services ... 911
Murray; Jones *v.* 973
Murray; Owens *v.* 945
Murray; Salim *v.* 943
Nabkey *v.* Peckeral 909
Nabraski *v.* Workers' Compensation Appeals Bd. 923
Nancy B. *v.* Charlotte M. 991
Nascimento *v.* State Bar of Montana 971
National Distillers & Chemical Corp.; Delta Holdings, Inc. *v.* 985
Nationalist Movement; Forsyth County *v.* 933,957
NLRB; Health Employees *v.* 950
NLRB; Human Development Assn. *v.* 950
NLRB; International Chemical Co. *v.* 959
NLRB; Litton Microwave Cooking Products, Division of Litton Systems, Inc. *v.* 985
NLRB; New Berlin Grading Co. *v.* 984
NLRB; Norco Products *v.* 972
NLRB; U. S. Marine Corp. *v.* 936
NLRB; USA McDonald Corp. *v.* 972
National Mines Corp.; Noble *v.* 907
National Railroad Passenger Corp. *v.* Boston & Maine Corp. 407
National Solid Wastes Management Assn.; Gade *v.* 917
Nationwide Mut. Ins. Co. *v.* Darden 318
Navarro *v.* Review Publications, Inc. 938
Navarro-Botello *v.* United States 942
Neal; Elfreeze *v.* 993
Nebraska; Joubert *v.* 918
Nebraska *v.* Wyoming 917,981
Netelkos *v.* United States 908
Neubert; Aten *v.* 945

	Page
Nevada; Flanagan *v.*	931
Nevada; Moore *v.*	930
Newark Morning Ledger Co. *v.* United States	970
New Beckley Mining Corp.; Mine Workers *v.*	971
New Berlin Grading Co. *v.* National Labor Relations Bd.	984
Newbert *v.* United States	997
Newcomb *v.* Ingle	915
New Hampshire; Connecticut *v.*	1002
New Hampshire; Hurlburt *v.*	1008
New Jersey; Ayars *v.*	955
New Jersey; Freas *v.*	979
New Jersey; Parker *v.*	939
New Jersey; Swinick *v.*	999
Newman *v.* Orentreich	958
Newport *v.* Brass Bull	959
Newport *v.* Lee	959
Newport Ltd. *v.* Board of Comm'rs, Orleans Levee Dist.	970
New York; Castillo *v.*	954
New York *v.* United States	903,917
New York City; ISCA Enterprises *v.*	906
New York City Bd. of Ed.; Lombard *v.*	953
New York Life Ins. Co.; Consolidated Beef Industries, Inc. *v.*	985
Nicaragua; Standard Fruit Co. *v.*	919
Nicklos Drilling Co.; Cowart's Estate *v.*	903,917
Nix; Ashburn *v.*	1008
Nix; Vorhauer *v.*	910
Noble *v.* National Mines Corp.	907
Noot; Bailey *v.*	952
Norco Products *v.* National Labor Relations Bd.	972
Nordic Village, Inc.; United States *v.*	30
Norfolk Southern R. Co.; Train Dispatchers *v.*	1005
Norman *v.* Virginia Electric & Power Co.	938
North *v.* United States	987
North Community Bank; John *v.*	979
Northern Arapaho Tribe of Wind River Reservation *v.* Foust	984
Northern Telecom, Inc.; Galbraith *v.*	945
Northwest Airlines, Inc.; Evans *v.*	907
Nowers *v.* Virginia	939
Nowicki *v.* Wisconsin Supreme Court, Judicial Administrative Dists. 1, 2, & 3	920
NPM Group, Inc. *v.* Benedetto	971
N. S. *v.* El Paso County	943
Nuzzo, *In re*	902
Nye County *v.* United States	919

	Page
Oakley *v.* United States	949
O'Bryan, *In re*	932
Ocampo *v.* United States	912
Ocean Brand Tuna; Clark *v.*	973
Ochoa *v.* United States	949
Ochoa-Fabian *v.* United States	961
O'Connor *v.* United States	999
Office of Personnel Management; Williams *v.*	941
Office of Secretary of State of Cal.; Cidlowski *v.*	989
Official Committee of Unsecured Creditors of White Farm Equipment Co. *v.* United States	919
Ogunleye *v.* Immigration and Naturalization Service	942
Ohio; Burney *v.*	960
Ohio *v.* Department of Energy	607
Ohio; Department of Energy *v.*	607
Ohio; Frazier *v.*	941
Ohio; Gnatovich *v.*	919
Ohio *v.* Miller	998
Ohio; Morales *v.*	974
Ohio; Patton *v.*	1005
Ohio; Smith *v.*	964
Ohio; Vance *v.*	974
Ohio Civil Rights Comm'n; Little Forest Medical Center of Akron *v.*	906
Ohio Dept. of Human Services *v.* Ohio Hospital Assn.	940
Ohio Hospital Assn.; Ohio Dept. of Human Services *v.*	940
Oklahoma; Arkansas *v.*	91
Oklahoma; Battenfield *v.*	943
Oklahoma; Environmental Protection Agency *v.*	91
Oklahoma; Harris *v.*	943
Oklahoma; Robison *v.*	915
Oklahoma; Stouffer *v.*	965
Oklahoma; Van Woundenberg *v.*	916,993
Oklahoma; Williamson *v.*	973
Oklahoma City Police Dept.; Parker *v.*	993
Oklahoma State Dept. of Health; Ying Shen *v.*	1005
Oklahoma Turnpike Authority; Stephenson *v.*	971
O'Leary; Holman *v.*	943
O'Leary; Whitlock *v.*	943
Olsen; Lake Country, Inc. *v.*	972
O'Malley; Moore *v.*	967
Optimal Data Corp. *v.* United States	986
Orentreich; Newman *v.*	958
Ortis *v.* Delmar Offshore, Inc.	922
Osbond *v.* Crist	1009

	Page
Oseguera-Lucatero *v.* United States	948
Ouzts *v.* South Carolina	938
Overton; Vertin *v.*	992
Owens *v.* Department of Veterans Affairs	911
Owens *v.* Murray	945
Owens-Corning Fiberglas Corp.; Kluzer *v.*	939
Owens-Corning Fiberglas Corp. *v.* Webb	919
Pacific Maritime Assn.; Fairchild *v.*	984
Pack, *In re*	932
Page; Herman *v.*	986
Paige *v.* United States	963
Palmer; King *v.*	918
Palomar Mobilehome Park Assn. *v.* San Marcos	983
Pandey *v.* United States	955
Parcel of Land, Bldgs., Appurtenances, and Improvements, Known as 92 Buena Vista Avenue, Rumson, N. J.; United States *v.*	905
Pariseau *v.* Jago	910
Parke *v.* Raley	905,957,969
Parker *v.* Florida	912
Parker *v.* New Jersey	939
Parker *v.* Oklahoma City Police Dept.	993
Parks *v.* Reynolds	928
Parmasavam *v.* United States	941
Partredereit af. 15.5.81; Harwood *v.*	907
Parziale *v.* United States	946
Paschal *v.* Lambdin	993
Patel *v.* Milgram	987
Patillo *v.* Las Vegas	963
Patterson *v.* Butler	990
Patterson *v.* Shumate	934,969,981
Patterson *v.* United States	1011
Patton *v.* Ohio	1005
Paty *v.* Maui Loa	938
Paty *v.* Price	938
Pavlico *v.* United States	967
Payne *v.* United States	975,988
Pea *v.* United States	912
Pearson *v.* United States	918
Pechiney & Trefimetaux *v.* Gould, Inc.	978
Peckeral; Nabkey *v.*	909
Pecoraro *v.* Illinois	999
Pedroza *v.* United States	908
Pelaez-Carmona *v.* United States	947
Penn Central Corp. *v.* United States	906

	Page
Pennell *v.* Risley	929
Pennsylvania; Faulkner *v.*	989
Pennsylvania; Green *v.*	964
Pennsylvania *v.* Welch	926
Pennsylvania; Young *v.*	974
Pennsylvania; Zimmerman *v.*	945
Pennsylvania Unemployment Comp. Bd. of Review; Wesley *v.*	985
Penthouse International, Ltd. *v.* Meese	950
Peralta *v.* United States	940
Perez *v.* United States	942
Perkins; Minniefield *v.*	916
Perko; Bowers *v.*	939
Perry *v.* United States	1006
Peters; Cunningham *v.*	940
Peters; Lucien *v.*	945
Peters *v.* United States	911
Peterson; Carson *v.*	990
Peterson; Jeffress *v.*	989
Petillo *v.* McClellan	945
PFZ Properties, Inc. *v.* Rodriguez	257
Phelps *v.* Angelone	922
Philadelphia; After Midnight *v.*	984
Philadelphia; Fraternal Order of Police, Lodge No. 5 *v.*	984
Philadelphia; Midnight Sessions, Ltd. *v.*	984
Philadelphia *v.* Simmons	985
Phillipe *v.* United States	947
Phonetele, Inc. *v.* American Telephone & Telegraph Co.	914
Pink *v.* United States	948
Pinkston *v.* United States	942
Piotrowski *v.* Chicago	986
Pipefitters *v.* Daniels	951
Piron *v.* De Groote	967
Pitts; Freeman *v.*	467
Pizzuto *v.* Idaho	908
Planned Parenthood of S. E. Pa. *v.* Casey	933,957,981
Planned Parenthood of S. E. Pa.; Casey *v.*	933,957,981
Platsis, P. C. *v.* E. F. Hutton & Co.	984
Polk *v.* Reynolds	975
Ponte; Robinson *v.*	922
Poole *v.* United States	948
Pope *v.* Washington	993
Popkin *v.* United States	1004
Postman; Bacchus *v.*	944
Prather *v.* Thomas	922

Page
Prelesnik; Chung Kun Yim *v.* 945
President of United States; Farsaci *v.* 939
President of United States; Wagner Seed Co. *v.* 970
Presnick, *In re* 980
Pressler *v.* United States Fidelity & Guaranty Co. 927
Pressman Toy Corp.; Hofmann *v.* 963
Preuss, *In re* 982
Price *v.* Hawaii 938
Price; Paty *v.* 938
Pri-Cor, Inc.; Skelton *v.* 989
Privette *v.* United States 912
Production Credit Assn. of Mandan; Rub *v.* 1000
Professional Real Estate Investors, Inc. *v.* Columbia Pictures Industries, Inc. 958
Prows *v.* United States 931
Prunty *v.* Baker 991
Public Utility Dist. No. 1, Douglas Cty. *v.* Bonneville Power Admin. 1004
Puckett; Jones *v.* 999
Pueblo of Santo Domingo *v.* Thompson 984
Puerto Rico Aqueduct and Sewer Authority *v.* Metcalf & Eddy, Inc. 918,957,1002
Purkett; Tyler *v.* 973
Purvis *v.* Singletary 940
Putka *v.* First Catholic Slovak Union of U. S. and Canada 986
Quick & Reilly Clearing Corp.; Gargallo *v.* 927
Quigg; Halas *v.* 955,1001
Quilter; Voinovich *v.* 979
Quinsky *v.* United States 964
Quinton; Arizona *v.* 920
Quirke, *In re* 1004
Ragonese *v.* United States 995
Ragsdale; Turnock *v.* 916
Raibon *v.* United States 962
Railroad Comm'n of Tex. *v.* Missouri Pacific R. Co. 1003
Raley; Parke *v.* 905,957,969
Ramirez *v.* Illinois 912
Ramos *v.* United States 908
Ramsey *v.* Armontrout 991
Randall; Morgenthau *v.* 972
Randle *v.* Kentucky 988
Rangel *v.* United States 940
Rankins *v.* Weisenburger 989
Ransom *v.* United States 972
Rapps *v.* Jackson 960

	Page
Rasa *v.* United States	959
Ratliff, *In re*	932
Rautenberg *v.* United States	997
Rautenberg *v.* U. S. District Court	997
Ray *v.* Conrail	927
Ray *v.* Consolidated Rail Corp.	927
Ray; Department of State *v.*	917
Razo *v.* California	974
Reber *v.* United States	987
Redman; Cain *v.*	922
Redman; Harding *v.*	944
Redman; Wesley *v.*	910,999
Red River Federal Credit Union; Stanley *v.*	992
Reed *v.* Social Security Administration	961
Reed *v.* United States	996
Rees *v.* Reyes	991
Reese *v.* Fulcomer	988
Regional Governing Bd. of Region V Mental Retardation Services; Bouchard *v.*	1005
Reichlin *v.* Williams, Novack & Hansen	940
Reinbold *v.* Dewey County Bank	946
Reininghaus *v.* Reininghaus	945
Reneer *v.* Samberg	964
Renfro; Emporia *v.*	915
Renfro; Mitchell *v.*	910
Republican Party of Ore. *v.* Keisling	970
Republic of Argentina *v.* Weltover	917
Republic of Nicaragua; Standard Fruit Co. *v.*	919
Restrepo *v.* Small Business Administration	977
Restrepo *v.* United States	961
Rettig, *In re*	927
Review Publications, Inc.; Navarro *v.*	938
Reyes; Rees *v.*	991
Reynolds; Parks *v.*	928
Reynolds; Polk *v.*	975
Reynolds; Robison *v.*	929
Reynolds *v.* Steelworkers	970
Reynolds *v.* United States	965
Riasgo-Bonilla *v.* United States	1011
Rich *v.* Action S. A.	1006
Richards *v.* Delaware Court Officials	929
Richards *v.* Liberty Mut. Fire Ins. Co.	1004
Richards *v.* Terrazas	957
Richardson *v.* Hesse	1008

Page
Richardson *v.* Monterey County 974
Richardson *v.* United States 936
Richard Soong & Co. (USA); Gaub *v.* 971
Richmond *v.* Lewis 958
Richmond, Fredericksburg & Potomac R. Co. *v.* United States .. 984
Rigsby *v.* United States 908
Risley; Pennell *v.* 929
Ritcherson *v.* United States 943,945
Rivera *v.* United States 996
Rivera-Feliciano *v.* United States 987
Riverside; Ruggles *v.* 947
Rives *v.* Interstate Commerce Comm'n 959
R. L. C.; United States *v.* 291
Roark *v.* United States 949
Robbins, *In re* 916
Roberts; Hunter *v.* 945
Robertson *v.* Seattle Audubon Society 429
Robinson *v.* Ponte 922
Robinson *v.* South Carolina 937
Robinson *v.* United States 1009
Robinson; Wallace *v.* 961
Robison *v.* Oklahoma 915
Robison *v.* Reynolds 929
Rodney *v.* United States 948
Rodriguez; Mabery *v.* 993
Rodriguez; PFZ Properties, Inc. *v.* 257
Rogers *v.* United States 947
Rollins *v.* Tennessee 946
Romein; General Motors Corp. *v.* 181
Romero *v.* Caldwell 993
Romulus *v.* United States 992
Roosevelt County; Ingalls *v.* 982
Roper; Lucien *v.* 945
Rosch, *In re* 968
Rosebud County; Enright *v.* 974
Ross *v.* Dakota Rail, Inc. 962
Roth; Springer *v.* 909
Rouse; Camoscio *v.* 914
Rowland *v.* California Men's Colony Men's Advisory Coun. 905,934
Rowland *v.* California Men's Colony, Unit II Men's Advisory Coun. 1003
Rub *v.* Adolph Rub Trust 911,1000
Rub *v.* Production Credit Assn. of Mandan 1000
Rubiano-Martinez *v.* United States 1007
Ruggles *v.* Riverside 947

	Page
Ruiz *v.* United States	943
Runda; French *v.*	1008
Russ *v.* International Paper Co.	987
Russe; Lewis *v.*	921
Rutgers; Foster *v.*	906
Ryan *v.* Chicago	918
Ryan; Spiegel *v.*	970
S. *v.* El Paso County	943
Saffle; Funkhouser *v.*	990
St. Germaine *v.* Circuit Court for Vilas County	997
Salami *v.* United States	988
Saleem *v.* 3–M Co.	1000
Salerno; United States *v.*	903
Salim *v.* Murray	943
Salton; Marshall *v.*	964
Samberg; Reneer *v.*	964
Sampson; Utah *v.*	914
Samuels *v.* Hawley	948
Samuels *v.* United States	987
San Antonio; Houston Lighting & Power Co. *v.*	938
Sanders *v.* United States	908
Sandoz Crop Protection Corp.; Shutt *v.*	937
San Francisco; Associated General Contractors of Cal., Inc. *v.*	985
San Francisco *v.* Federal Aviation Administration	983
Sangre de Cristo Development Co. *v.* United States	1004
San Marcos; Palomar Mobilehome Park Assn. *v.*	983
Saul; Benfield *v.*	998
Savage *v.* Florida	943
Savage *v.* United States	950
Savenelli *v.* Meachum	1011
Schacht *v.* Caterpillar, Inc.	926
Schalk *v.* Texas	1006
Schatz *v.* Weinberg & Green	936
Scher; Engelke *v.*	952
Schererville; Zavesky *v.*	941
Schimmel *v.* United States	965
Schlup *v.* Armontrout	909
Schmalzried *v.* United States	911
Schmidt *v.* Schmidt	979
Schmitt *v.* Florida	964
Schowengerdt *v.* United States	951
Schwartz *v.* Flint	961
Schwarzer *v.* Douglas County	960
Schweitzer; Taylor *v.*	909

Page
Scott *v.* California 977
Scott *v.* Texas 944
Scott *v.* United States 998
Seattle Audubon Society; Robertson *v.* 429
Secretary of Commerce *v.* Massachusetts 929,954,981
Secretary of Commerce; Massachusetts *v.* 969
Secretary of Health and Human Services; Young *v.* 918
Secretary of Labor; Cooper Electric Supply Co. *v.* 936
Secretary of Navy; Von Croney *v.* 927
Secretary of State of Ala. *v.* Wesch 954
Secretary of State of Colo.; Colorado Libertarian Party *v.* 985
Secretary of State of Minn. *v.* Emison 958
Secretary of State of Ore.; Republican Party of Ore. *v.* 970
Secretary of Transportation; Ward *v.* 959
Secretary of Veterans Affairs; Manfred *v.* 921
Securities and Exchange Comm'n; Lin *v.* 907
Securities Investor Protection Corp.; Holmes *v.* 258
Senkowski; Greene *v.* 950
Sewell *v.* United States 962
Shabazz *v.* Arkansas 910
Shackelford *v.* Armontrout 991
Shannon *v.* United Services Automobile Assn. 958
Shano *v.* United States 954
Shaw *v.* Missouri 910
Shearson Lehman Mortgage Corp. *v.* Laguna 966
Shekell; Evonuk *v.* 986
Shelton *v.* Davis 908
Shelton *v.* Mattina 909
Shepherd *v.* United States 987
Sherman *v.* United States 906
Shimota *v.* United States 984
Short *v.* United States 989
Shriver *v.* GAF Corp. 987
Shubbie *v.* Louisiana 993
Shumate *v.* Creasy 999
Shumate; Patterson *v.* 934,969,981
Shutt *v.* Sandoz Crop Protection Corp. 937
Sid Goodman & Co. *v.* United States 970
Siggers *v.* Tunica County Bd. of Supervisors 901
Silva; Gray *v.* 1008
Simmons *v.* Beyer 944
Simmons; Philadelphia *v.* 985
Simmons *v.* Simmons 992
Sims; Hoang *v.* 986

	Page
Singer *v.* United States	962
Singletary; Andrews *v.*	947
Singletary; Brennan *v.*	990
Singletary; Cahill *v.*	966
Singletary; Johnson *v.*	992
Singletary; Jordan *v.*	964
Singletary; Kemp *v.*	1010
Singletary; Kennedy *v.*	953,1012
Singletary; Martin *v.*	1009
Singletary; McKinney *v.*	922
Singletary; Merchant *v.*	963
Singletary; Purvis *v.*	940
Singletary *v.* United States	912
Singletary; White *v.*	910
Sireci *v.* Florida	946
Sivalignham; Birsner *v.*	985
Sivley; Harris *v.*	946
Skelton *v.* Pri-Cor, Inc.	989
Skillern *v.* United States	949
Sky Chefs, Inc. *v.* Dias	920
Slauson *v.* United States	1011
Sloan *v.* United States	953
Slocum *v.* Thomas	1008
Small Business Administration; Restrepo *v.*	977
Smith *v.* Black	930
Smith; Broida *v.*	1005
Smith *v.* Bunnell	992
Smith; Dean *v.*	909
Smith *v.* Estlack	1007
Smith; Holywell Corp. *v.*	47
Smith; Jermosen *v.*	962
Smith; Ladner *v.*	983
Smith *v.* Lynaugh	944
Smith; Moody *v.*	960
Smith *v.* Ohio	964
Smith *v.* United States	923,951,959
Smith; United States *v.*	47
Smith County; Eatherly *v.*	1005
Smylie *v.* United States	949
Smyth *v.* Gipson	971
Smythe *v.* Green	953
Snyder *v.* Armontrout	992
Sobel; Chagall *v.*	986
Social Security Administration; Reed *v.*	961

Page
Sodoro, Daly & Sodoro Law Firm; Hanus *v.* 972
Soehngen *v.* Merit Systems Protection Bd. 939
Solano; Vigil *v.* 961
Soldal *v.* Cook County 918
Soliman; Commissioner *v.* 935,969
Solis *v.* Texas 992
Solodky, *In re* 980
Solomon, *In re* 916
Solowitch, *In re* 955
Soong & Co. (USA); Gaub *v.* 971
Sorboturf Enterprises; Spectrum Sports, Inc. *v.* 958
Sosa *v.* United States 942
South Carolina; Cohen *v.* 942
South Carolina; Crosland *v.* 1007
South Carolina; Green *v.* 962
South Carolina; Jefferies *v.* 931
South Carolina; Johnson *v.* 993
South Carolina *v.* Manning 914
South Carolina; Morgan *v.* 963
South Carolina; Ouzts *v.* 938
South Carolina; Robinson *v.* 937
Southern Shipbuilding Corp.; Easley *v.* 930
Southwestern Bell Telephone Co. *v.* Langston 914
Southwest Gas Inc.; Hintze *v.* 965
Spaeth *v.* United States 961
Speaker Pro Tempore of Ohio House of Reps.; Voinovich *v.* 979
Spectrum Sports, Inc. *v.* McQuillan 958
Spectrum Sports, Inc. *v.* Sorboturf Enterprises 958
Spence; Flynt *v.* 984
Spiegel *v.* Ryan 970
Springer *v.* Roth 909
Square D Co.; Cordle *v.* 963
Staggers; Duke *v.* 1007
Stahlhut; Weidman *v.* 975
Stainer; Brown *v.* 989
Stalder; Kaltenbach *v.* 963
Standard Fruit Co. *v.* Republic of Nicaragua 919
Stanek; Lac d'Amiante du Quebec, Ltee *v.* 977
Stanley *v.* Red River Federal Credit Union 992
Stanley *v.* United States 975
Starks *v.* McMackin 944
Starr *v.* Altoona 907
State. See name of State.

Page

State Administrative Bd. of Election Laws; Anne Arundel County Republican Central Comm. *v.* 969
State Bar of Montana; Nascimento *v.* 971
State Revenue Comm'r of Ga.; Adam Cab Co. *v.* 960
State Revenue Comm'r of Ga.; Adam Cab, Inc. *v.* 960
State Traffic Comm'n of Conn.; West Farms Associates *v.* 985
Steele *v.* Minnesota 922
Steelworkers; Reynolds *v.* 970
Stella, *In re* 979
Stephen *v.* California State Bank 992
Stephenson *v.* Oklahoma Turnpike Authority 971
Stewart *v.* Florida 976
Stewart *v.* United States 948
Stokes *v.* United States 964
Stone; Ahmed *v.* 953
Stone *v.* Dallman 953
Stone Container Corp.; Davis *v.* 927
Stouffer *v.* Oklahoma 965
Stowell *v.* United States 908
Straughter *v.* United States 948
Strickrath; Molina *v.* 990
Stringer *v.* Black 222
Stuart *v.* United States 976
Sullivan; Laureano *v.* 999
Sullivan; Young *v.* 918
Sullivan County; Toliver *v.* 934
Sully *v.* California 944
Sulphur Springs Valley Electric Cooperative; Brooks *v.* 938
Sun *v.* Forrester 921,999
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., Los Angeles County; Hassneh Ins. Co. of Israel, Ltd. *v.* 940
Superior Court of Cal., San Francisco County; Kutsko *v.* 907
Supreme Court of Mo.; Jacobs *v.* 920,999
Supreme Court of Wash.; Demos *v.* 982,1003
Surillo; Drilake Farms, Inc. *v.* 981
Suter *v.* Artist M. 347
Sutherland *v.* Sutherland 952
Swan *v.* United States 941
Sweeton; McGinnis *v.* 926
Swickle, *In re* 956
Swingler *v.* Internal Revenue Service 1009
Swinick *v.* Diamond 911

Page

Swinick *v.* New Jersey 999
Sword; Wyles *v.* 1011
Tabrizian *v.* Mody 972
Taco Cabana, Inc.; Two Pesos, Inc. *v.* 957
Taitague *v.* First Island Industry, Inc. 936
Tanner; Kahn *v.* 942
Tansy; Garrison *v.* 1007
Taub, *In re* 902
Tavolacci, *In re* 968
Tax Comm'r, Va. Dept. of Taxation; Chesapeake Western R. Co. *v.* 966
Taylor; Arizona *v.* 998
Taylor *v.* Freeland & Kronz 638
Taylor *v.* Schweitzer 909
Taylor *v.* United States 973
Taylor *v.* Utah 966
Taylor *v.* Washington 973,989
Taylor *v.* Whitley 988
Teamsters *v.* Bender 986
Teich *v.* United States 919
Teledyne Electronics; Greene *v.* 954
Tennessee; Groseclose *v.* 1006
Tennessee; Rollins *v.* 946
Terrazas; Richards *v.* 957
Terrell; Diaz *v.* 947
Territory. See name of Territory.
Tessler, *In re* 980
Texas; Boyle *v.* 921
Texas; Caldwell *v.* 990
Texas *v.* Cook 998
Texas; Ellis *v.* 915
Texas; Farris *v.* 911
Texas; Hollis *v.* 992
Texas; Lewis *v.* 920
Texas; Schalk *v.* 1006
Texas; Scott *v.* 944
Texas; Solis *v.* 992
Texas; Trevino *v.* 562
Texas; Valladares *v.* 964
Texas *v.* Walker 939
Thanh Van Vo; Thanh Vong Hoai *v.* 967
Thanh Vong Hoai *v.* Thanh Van Vo 967
Thomas; Prather *v.* 922
Thomas; Slocum *v.* 1008
Thomas *v.* United States 965,988

	Page
Thomason *v.* United States Steel Corp.	944
Thompson *v.* Covington	986
Thompson; DeKalb Bd. of Realtors, Inc. *v.*	903
Thompson; Fitzgerald *v.*	999
Thompson; Pueblo of Santo Domingo *v.*	984
Thompson *v.* United States	949
Thompson; United States *v.*	984
Thompson; Upton *v.*	906
Thompson Realty; DeKalb Bd. of Realtors, Inc. *v.*	903
Thornburg; Head *v.*	904
3–M Co.; Saleem *v.*	1000
Thulen *v.* Bausman	906
Tifco Industries, Inc.; Guthrie *v.*	908
Timber Falling Consultants; Beijing Ever Bright Industrial Co. *v.*	918
Todaro *v.* Fulcomer	909
Toliver *v.* Sullivan County	934
Tolliver *v.* United States	996
Toro Aristizabal *v.* United States	921
Tovar-Paz *v.* United States	966
Town. See name of town.	
Train Dispatchers *v.* Norfolk Southern R. Co.	1005
Transamerica Ins. Co. *v.* United States	970
Transcontinental Corp.; Lake at Las Vegas Investors Group, Inc. *v.*	920
Transportation Communications Union; Kidwell *v.*	1005
Trappe; Homebuilders Assn. of Bucks/Montgomery Counties *v.*	986
Travers *v.* Bullis School, Inc.	931
Trevino *v.* Texas	562
Trippet; Dennler *v.*	978,1003
Trudgeon, *In re*	955
Tucker *v.* Love	943
Tucker *v.* United States	908,996
Tuggle *v.* Bair	989
Tukwila *v.* World Wide Video, Inc.	986
Tunica County Bd. of Supervisors; Siggers *v.*	901
Turner; Fant *v.*	963
Turnock *v.* Ragsdale	916
Two Pesos, Inc. *v.* Taco Cabana, Inc.	957
Tyler *v.* Purkett	973
Uberoi *v.* University of Colo. Bd. of Regents	1006
Ulloa *v.* United States	977
Union. For labor union, see name of trade.	
Unionamerica Ins. Co. *v.* California	934
Union Mortgage Co. *v.* Barlow	931
Union Oil Co. of Cal. *v.* Bates	1005

	Page
Union Oil Co. of Cal. *v.* Hamilton	1005
Union Township; Chez Sez III Corp. *v.*	907
United. For labor union, see name of trade.	
United Airlines, Inc.; Alaska Airlines, Inc. *v.*	977
United Services Automobile Assn.; Shannon *v.*	958
United States. See name of other party.	
U. S. District Court; Aldridge *v.*	988
U. S. District Court; Gomez *v.*	653
U. S. District Court; Rautenberg *v.*	997
U. S. District Court; Walker *v.*	954
U. S. District Judge; Balawajder *v.*	972
United States Fidelity & Guaranty Co.; Pressler *v.*	927
U. S. Marine Corp. *v.* National Labor Relations Bd.	936
U. S. Parole Comm'n; Wright *v.*	1009
United States Steel Corp.; Thomason *v.*	944
United Truck Maintenance; Blegen *v.*	999
University of Ark.; Morris *v.*	999
University of Chicago; Montgomery *v.*	944
University of Colo. Bd. of Regents; Uberoi *v.*	1006
University of Miss. Medical Center; Williams *v.*	992
UNR Industries, Inc.; Continental Casualty Co. *v.*	971
Upton *v.* Thompson	906
USA McDonald Corp. *v.* National Labor Relations Bd.	972
Usher *v.* Jones	909
Utah *v.* Sampson	914
Utah; Taylor *v.*	966
Utesch *v.* Dittmer	1006
Vaccaro *v.* United States	949
Valladares *v.* Texas	964
Vance *v.* Ohio	974
Van Vo; Thanh Vong Hoai *v.*	967
Van Wagner *v.* United States	976
Van Woundenberg *v.* Oklahoma	916,993
Vasquez *v.* Brown	1011
Vasquez *v.* Harris	1000
Vasquez; Harris *v.*	910
Venus; Wharton *v.*	995
Vertin *v.* Overton	992
Veterans Administration; Dean *v.*	902
Viehweg *v.* Devereux	927
Vigil *v.* Solano	961
Villalobos-Hernandez *v.* United States	977
Villa Marina Yacht Sales, Inc. *v.* Hatteras Yacht	986
Virginia; Coleman *v.*	920

	Page
Virginia; George *v.*	973
Virginia; Gill *v.*	1008
Virginia; Lovings *v.*	946
Virginia; Nowers *v.*	939
Virginia; Yeatts *v.*	946
Virginia Electric & Power Co.; Norman *v.*	938
Virgin Islands; George *v.*	1009
Vo; Thanh Vong Hoai *v.*	967
Voinovich *v.* Quilter	979
Von Croney *v.* Garrett	927
Vong Hoai *v.* Thanh Van Vo	967
Vorhauer *v.* Conrad	962
Vorhauer *v.* Nix	910
Wade *v.* Georgia	953
Waggoner *v.* Collins	946
Wagner Seed Co. *v.* Bush	970
Walden; Csoka *v.*	938
Waldner; Crosby *v.*	1007
Waldron, *In re*	916
Walgreen's Co.; Lee *v.*	963
Walker *v.* Exxon Corp.	954
Walker; Texas *v.*	939
Walker *v.* U. S. District Court	954
Wallace *v.* Robinson	961
Walls *v.* Cooper	1006
Walsh *v.* United States	923
Walters *v.* United States	1010
Ward *v.* Secretary of Transportation	959
Ward *v.* Ward	947
Warden. See also name of warden.	
Warden, Ossining Facility; LaSalle *v.*	993
Warden, Smithfield State Prison; Alleyn *v.*	910
Warner *v.* Ellerbe	908
Washington *v.* Confederated Tribes of Colville Reservation	997
Washington; Doescher *v.*	974
Washington *v.* Estelle	1008
Washington; Pope *v.*	993
Washington; Taylor *v.*	973,989
Watson, *In re*	956
Watson *v.* United States	994
Watts *v.* United States	911
Webb; Owens-Corning Fiberglas Corp. *v.*	919
Webster *v.* California	1009
Webster; Gamble *v.*	974

Page
Weidman *v.* Stahlhut 975
Weinberg & Green; Schatz *v.* 936
Weisenburger; Rankins *v.* 989
Welch; Pennsylvania *v.* 926
Wellman, *In re* 903
Wells; Grimes *v.* 963
Welt, *In re* 999
Weltover; Argentina *v.* 917
Weninger *v.* Brooks 921
Wesch; Camp *v.* 954
Wesley *v.* Pennsylvania Unemployment Comp. Bd. of Review ... 985
Wesley *v.* Redman 910,999
West; Wright *v.* 917,933
Westbrook *v.* Los Angeles 991
Western Line Consol. School Dist.; Greenville Public School Dist. *v.* 950
West Farms Associates *v.* State Traffic Comm'n of Conn. 985
Westinghouse Credit Corp.; Cortec Industries, Inc. *v.* 960
Wharton *v.* Venus 995
Wheeler *v.* Building Grievance Committee of O'Fallon 998
White, *In re* 931,980
White *v.* Alabama 953
White; Cartwright *v.* 963
White *v.* Collins 1001
White *v.* Singletary 910
White Buffalo Construction, Inc. *v.* J. Arlie Bryant, Inc. 986
Whitley; Freeman *v.* 973
Whitley; Kaltenbach *v.* 961
Whitley; Taylor *v.* 988
Whitlock *v.* O'Leary 943
Wickliffe *v.* Aiken 974
Widenhouse *v.* Louisiana 910
Wiggins *v.* Maryland 1007
Wiley, *In re* 955
Wilkerson *v.* Lake County Superior Court 959
William; Brown *v.* 909
Williams; Balawajder *v.* 972
Williams *v.* Banks 962
Williams *v.* Georgia 999
Williams *v.* Louisiana State Penitentiary 990
Williams *v.* Office of Personnel Management 941
Williams *v.* United States 193,912,941,948,950,965,977,999
Williams *v.* University of Miss. Medical Center 992
Williams; Withrow *v.* 983
Williams, Novack & Hansen; Reichlin *v.* 940

	Page
Williamson *v.* Oklahoma	973
Willoughby *v.* Willoughby	907
Willy *v.* Coastal Corp.	131
Wilmington Trust Co.; Connecticut Bank & Trust Co. *v.*	966
Wilson *v.* Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax	959
Wilson *v.* United States	976,994
Wilson; United States *v.*	329
Winn, *In re*	956
Winn *v.* United States	976
Wintherthur Reinsurance Corp. of America *v.* California	934
Wion *v.* Collins	967
Wirsing *v.* Board of Regents of Univ. of Colo.	906
Wisconsin; J. E. B. *v.*	940
Wisconsin Supreme Court, Judicial Administrative Dists. 1, 2, & 3; Nowicki *v.*	920
Withrow *v.* Williams	983
Wolverine Radio Co.; Michigan Employment Security Comm'n *v.*	978
Wood *v.* United States	908
Woodman; Cunningham *v.*	943
Woods *v.* United States	961
Workers' Compensation Appeals Bd.; Nabraski *v.*	923
Workmen's Compensation Appeal Bd.; Mooyman *v.*	982
World Wide Video, Inc.; Tukwila *v.*	986
Worth *v.* United States	927
Wrenn *v.* Clark	992
Wright; Franzen *v.*	944
Wright *v.* U. S. Parole Comm'n	1009
Wright *v.* West	917,933
Wyles *v.* Sword	1011
Wyman; Larner *v.*	990
Wyoming; Nebraska *v.*	917,981
Wyoming County Prison Bd.; Huffsmith *v.*	946
Yanke *v.* Florida	973
Yant *v.* United States	997
Yates *v.* McMackin	990
Yavapai County; Boudette *v.*	943
Yeatts *v.* Virginia	946
Yee *v.* Escondido	519
Yellow Cab Metro, Inc.; McDonald *v.*	982
Yepma *v.* United States	972
Yim *v.* Prelesnik	945
Ying Shen *v.* Oklahoma State Dept. of Health	1005
Young *v.* Florida	999
Young *v.* Herring	940

Page
Young *v.* Pennsylvania 974
Young *v.* Sullivan 918
Young *v.* United States 964,1010
Young & Rubicam, Inc. *v.* Midler 951
Young & Rubicam, Inc.; Midler *v.* 951
Zadan, *In re* 955
Zafiro *v.* United States 935
Zant; Blankenship *v.* 962
Zant *v.* Horton 952
Zavesky *v.* Schererville 941
Zepeda *v.* Dorsey 948
Zhou *v.* Ciarkowski 1008
Zimmerman; Howard *v.* 944
Zimmerman *v.* Pennsylvania 945
Zolicoffer, *In re* 905
Zuckerman *v.* United States 966
Zzie, *In re* 958

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1991

HUDSON *v.* McMILLIAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–6531. Argued November 13, 1991—Decided February 25, 1992

Petitioner Hudson, a Louisiana prison inmate, testified that minor bruises, facial swelling, loosened teeth, and a cracked dental plate he had suffered resulted from a beating by respondent prison guards McMillian and Woods while he was handcuffed and shackled following an argument with McMillian, and that respondent Mezo, a supervisor on duty, watched the beating but merely told the officers "not to have too much fun." The Magistrate trying Hudson's District Court suit under 42 U. S. C. § 1983 found that the officers used force when there was no need to do so and that Mezo expressly condoned their actions, ruled that respondents had violated the Eighth Amendment's prohibition on cruel and unusual punishments, and awarded Hudson damages. The Court of Appeals reversed, holding, *inter alia*, that inmates alleging use of excessive force in violation of the Amendment must prove "significant injury" and that Hudson could not prevail because his injuries were "minor" and required no medical attention.

Held: The use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury. Pp. 5–12.

(a) Whenever prison officials stand accused of using excessive physical force constituting "the unnecessary and wanton infliction of pain" violative of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley* v. *Albers*, 475 U. S. 312, 320–321: whether force was applied in a good-faith effort to maintain or restore

Syllabus

discipline, or maliciously and sadistically to cause harm. Extending *Whitley*'s application of the "unnecessary and wanton infliction of pain" standard to all allegations of force, whether the prison disturbance is a riot or a lesser disruption, works no innovation. See, *e. g.*, *Johnson* v. *Glick*, 481 F. 2d 1028, cert. denied, 414 U. S. 1033. Pp. 5–7.

(b) Since, under the *Whitley* approach, the extent of injury suffered by an inmate is one of the factors to be considered in determining whether the use of force is wanton and unnecessary, 475 U. S., at 321, the absence of serious injury is relevant to, but does not end, the Eighth Amendment inquiry. There is no merit to respondents' assertion that a significant injury requirement is mandated by what this Court termed, in *Wilson* v. *Seiter*, 501 U. S. 294, 298, the "objective component" of Eighth Amendment analysis: whether the alleged wrongdoing is objectively "harmful enough" to establish a constitutional violation, *id.*, at 303. That component is contextual and responsive to "contemporary standards of decency." *Estelle* v. *Gamble*, 429 U. S. 97, 103. In the excessive force context, such standards always are violated when prison officials maliciously and sadistically use force to cause harm, see *Whitley*, 475 U. S., at 327, whether or not significant injury is evident. Moreover, although the Amendment does not reach *de minimis* uses of physical force, provided that such use is not of a sort repugnant to the conscience of mankind, *ibid.*, the blows directed at Hudson are not *de minimis*, and the extent of his injuries thus provides no basis for dismissal of his § 1983 claim. Pp. 7–10.

(c) The dissent's theory that *Wilson* requires an inmate who alleges excessive force to show significant injury *in addition to* the unnecessary and wanton infliction of pain misapplies *Wilson* and ignores the body of this Court's Eighth Amendment jurisprudence. *Wilson* did not involve an allegation of excessive force and, with respect to the "objective component" of an Eighth Amendment claim, suggested no departure from *Estelle* and its progeny. The dissent's argument that excessive force claims and conditions-of-confinement claims are no different in kind is likewise unfounded. To deny the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment. See *Estelle*, *supra*, at 102. Pp. 10–11.

(d) This Court takes no position on respondents' legal argument that their conduct was isolated, unauthorized, and against prison policy and therefore beyond the scope of "punishment" prohibited by the Eighth Amendment. That argument is inapposite on the record, since the Court of Appeals left intact the Magistrate's determination that the violence at issue was not an isolated assault, and ignores the Magistrate's finding that supervisor Mezo expressly condoned the use of force. Moreover, to the extent that respondents rely on the unauthorized na-

Syllabus

ture of their acts, they make a claim not addressed by the Court of Appeals, not presented by the question on which this Court granted certiorari, and, accordingly, not before this Court. Pp. 11–12.

929 F. 2d 1014, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, KENNEDY, and SOUTER, JJ., joined, and in which STEVENS, J., joined as to Parts I, II–A, II–B, and II–C. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 12. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 13. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 17.

Alvin J. Bronstein, by appointment of the Court, 500 U. S. 903, argued the cause for petitioner. With him on the briefs were *John A. Powell*, *Steven R. Shapiro*, *Mark J. Lopez*, and *Elizabeth Alexander*.

Deputy Solicitor General Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorneys General Dunne* and *Mueller*, *Acting Deputy Solicitor General Wright*, and *Ronald J. Mann*.

Harry McCall, Jr., Special Assistant Attorney General of Louisiana, argued the cause for respondents. With him on the brief were *William J. Guste, Jr.*, Attorney General, *Jonathan C. McCall*, Special Assistant Attorney General, and *Jenifer Schaye*, *Clifton O. Bingham, Jr.*, *Houston C. Gascon III*, and *Joseph Erwin Kopsa*, Assistant Attorneys General.*

---

*Briefs of *amici curiae* urging reversal were filed for Americans for Effective Law Enforcement, Inc., by *Daniel B. Hales*, *Emory A. Plitt, Jr.*, *Wayne W. Schmidt*, and *James P. Manak*; for the D. C. Prisoners' Legal Services Project, Inc., by *Theodore A. Howard* and *Richard J. Arsenault*; for Human Rights Watch by *Cameron Clark*; and for the Prisoners' Legal Service of New York by *John A. Gresham* and *Stephen M. Latimer*.

A brief of *amici curiae* urging affirmance was filed for the State of Texas et al. by *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Michael P. Hodge*, *Charles A. Palmer*, *Sharon Felfe*, and *Adrian L. Young*, Assistant Attorneys General, joined by the Attorneys General for their respective States as follows: *Warren Price III* of Hawaii, *Joseph B. Meyer* of Wyoming, *Frankie Sue Del Papa* of Nevada, and *Robert A. Butterworth* of Florida.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury. We answer that question in the affirmative.

I

At the time of the incident that is the subject of this suit, petitioner Keith Hudson was an inmate at the state penitentiary in Angola, Louisiana. Respondents Jack McMillian, Marvin Woods, and Arthur Mezo served as corrections security officers at the Angola facility. During the early morning hours of October 30, 1983, Hudson and McMillian argued. Assisted by Woods, McMillian then placed Hudson in handcuffs and shackles, took the prisoner out of his cell, and walked him toward the penitentiary's "administrative lockdown" area. Hudson testified that, on the way there, McMillian punched Hudson in the mouth, eyes, chest, and stomach while Woods held the inmate in place and kicked and punched him from behind. He further testified that Mezo, the supervisor on duty, watched the beating but merely told the officers "not to have too much fun." App. 23. As a result of this episode, Hudson suffered minor bruises and swelling of his face, mouth, and lip. The blows also loosened Hudson's teeth and cracked his partial dental plate, rendering it unusable for several months.

Hudson sued the three corrections officers in Federal District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging a violation of the Eighth Amendment's prohibition on cruel and unusual punishments and seeking compensatory damages. The parties consented to disposition of the case before a Magistrate, who found that McMillian and Woods used force when there was no need to do so and that Mezo expressly condoned their actions. App. 26. The Magistrate awarded Hudson damages of $800. *Id.*, at 29.

The Court of Appeals for the Fifth Circuit reversed. 929 F. 2d 1014 (1990). It held that inmates alleging use of excessive force in violation of the Eighth Amendment must prove: (1) significant injury; (2) resulting "directly and only from the use of force that was clearly excessive to the need"; (3) the excessiveness of which was objectively unreasonable; and (4) that the action constituted an unnecessary and wanton infliction of pain. *Id.*, at 1015. The court determined that respondents' use of force was objectively unreasonable because no force was required. Furthermore, "[t]he conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." *Ibid.* However, Hudson could not prevail on his Eighth Amendment claim because his injuries were "minor" and required no medical attention. *Ibid.*

We granted certiorari, 499 U. S. 958 (1991), to determine whether the "significant injury" requirement applied by the Court of Appeals accords with the Constitution's dictate that cruel and unusual punishment shall not be inflicted.

II

In *Whitley* v. *Albers*, 475 U. S. 312 (1986), the principal question before us was what legal standard should govern the Eighth Amendment claim of an inmate shot by a guard during a prison riot. We based our answer on the settled rule that "'the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Id.*, at 319 (quoting *Ingraham* v. *Wright*, 430 U. S. 651, 670 (1977)) (internal quotation marks omitted).

What is necessary to establish an "unnecessary and wanton infliction of pain," we said, varies according to the nature of the alleged constitutional violation. 475 U. S., at 320. For example, the appropriate inquiry when an inmate alleges that prison officials failed to attend to serious medical needs is whether the officials exhibited "deliberate indifference."

See *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976). This standard is appropriate because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns. *Whitley*, *supra*, at 320.

By contrast, officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance." 475 U. S., at 320. We accordingly concluded in *Whitley* that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.*, at 320–321 (quoting *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973)).

Many of the concerns underlying our holding in *Whitley* arise whenever guards use force to keep order. Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that "'[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" 475 U. S., at 321–322 (quoting *Bell* v. *Wolfish*, 441 U. S. 520, 547 (1979)). In recognition of these similarities, we hold that whenever prison officials stand ac-

cused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Extending *Whitley*'s application of the "unnecessary and wanton infliction of pain" standard to all allegations of excessive force works no innovation. This Court derived the *Whitley* test from one articulated by Judge Friendly in *Johnson* v. *Glick*, *supra*, a case arising out of a prisoner's claim to have been beaten and harassed by a guard. Moreover, many Courts of Appeals already apply the *Whitley* standard to allegations of excessive force outside of the riot situation. See *Corselli* v. *Coughlin*, 842 F. 2d 23, 26 (CA2 1988); *Miller* v. *Leathers*, 913 F. 2d 1085, 1087 (CA4 1990) (en banc), cert. denied, 498 U. S. 1109 (1991); *Haynes* v. *Marshall*, 887 F. 2d 700, 703 (CA6 1989); *Stenzel* v. *Ellis*, 916 F. 2d 423, 427 (CA8 1990); *Brown* v. *Smith*, 813 F. 2d 1187, 1188 (CA11 1987). But see *Unwin* v. *Campbell*, 863 F. 2d 124, 130 (CA1 1988) (rejecting application of *Whitley* standard absent "an actual disturbance").

A

Under the *Whitley* approach, the extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 475 U. S., at 321. In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat "reasonably perceived by the responsible officials," and "any efforts made to temper the severity of a forceful response." *Ibid.* The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.

Respondents nonetheless assert that a significant injury requirement of the sort imposed by the Fifth Circuit is mandated by what we have termed the "objective component" of Eighth Amendment analysis. See *Wilson* v. *Seiter*, 501 U. S. 294, 298 (1991). *Wilson* extended the deliberate indifference standard applied to Eighth Amendment claims involving medical care to claims about conditions of confinement. In taking this step, we suggested that the subjective aspect of an Eighth Amendment claim (with which the Court was concerned) can be distinguished from the objective facet of the same claim. Thus, courts considering a prisoner's claim must ask both if "the officials act[ed] with a sufficiently culpable state of mind" and if the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation. *Id.*, at 298, 303.

With respect to the objective component of an Eighth Amendment violation, *Wilson* announced no new rule. Instead, that decision suggested a relationship between the requirements applicable to different types of Eighth Amendment claims. What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends upon the claim at issue, for two reasons. First, "[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should . . . be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley, supra*, at 320. Second, the Eighth Amendment's prohibition of cruel and unusual punishments "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,'" and so admits of few absolute limitations. *Rhodes* v. *Chapman*, 452 U. S. 337, 346 (1981) (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)).

The objective component of an Eighth Amendment claim is therefore contextual and responsive to "contemporary standards of decency." *Estelle, supra*, at 103. For in-

stance, extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society," *Rhodes*, *supra*, at 347, "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, *supra*, at 298 (quoting *Rhodes*, *supra*, at 347) (citation omitted). A similar analysis applies to medical needs. Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious." See *Estelle* v. *Gamble*, 429 U. S., at 103–104.

In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. See *Whitley*, *supra*, at 327. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today. See *Estelle*, *supra*, at 102 (proscribing torture and barbarous punishment was "the primary concern of the drafters" of the Eighth Amendment); *Wilkerson* v. *Utah*, 99 U. S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]").

That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. See *Johnson* v. *Glick*, 481 F. 2d, at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"). The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition

de minimis uses of physical force, provided that the use of force is not of a sort "'repugnant to the conscience of mankind.'" *Whitley*, 475 U. S., at 327 (quoting *Estelle*, *supra*, at 106) (internal quotation marks omitted).

In this case, the Fifth Circuit found Hudson's claim untenable because his injuries were "minor." 929 F. 2d, at 1015. Yet the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis* for Eighth Amendment purposes. The extent of Hudson's injuries thus provides no basis for dismissal of his § 1983 claim.

B

The dissent's theory that *Wilson* requires an inmate who alleges excessive use of force to show serious injury *in addition to* the unnecessary and wanton infliction of pain misapplies *Wilson* and ignores the body of our Eighth Amendment jurisprudence. As we have already suggested, the question before the Court in *Wilson* was "[w]hether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required." *Wilson*, *supra*, at 296. *Wilson* presented neither an allegation of excessive force nor any issue relating to what was dubbed the "objective component" of an Eighth Amendment claim.

Wilson did touch on these matters in the course of summarizing our prior holdings, beginning with *Estelle* v. *Gamble*, *supra*. *Estelle*, we noted, first applied the Cruel and Unusual Punishments Clause to deprivations that were not specifically part of the prisoner's sentence. *Wilson*, *supra*, at 297. As might be expected from this primacy, *Estelle* stated the principle underlying the cases discussed in *Wilson:* Punishments "incompatible with the evolving standards of decency that mark the progress of a maturing society" or "involv[ing] the unnecessary and wanton infliction of pain" are "repugnant to the Eighth Amendment." *Estelle*, *supra*,

at 102–103 (internal quotation marks omitted). This is the same rule the dissent would reject. With respect to the objective component of an Eighth Amendment claim, however, *Wilson* suggested no departure from *Estelle* and its progeny.

The dissent's argument that claims based on excessive force and claims based on conditions of confinement are no different in kind, *post*, at 24–25, and n. 4, is likewise unfounded. Far from rejecting *Whitley*'s insight that the unnecessary and wanton infliction of pain standard must be applied with regard for the nature of the alleged Eighth Amendment violation, the *Wilson* Court adopted it. See *Wilson*, 501 U. S., at 302–303. How could it be otherwise when the constitutional touchstone is whether punishment is cruel and unusual? To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the "'concepts of dignity, civilized standards, humanity, and decency'" that animate the Eighth Amendment. *Estelle*, *supra*, at 102 (quoting *Jackson* v. *Bishop*, 404 F. 2d 571, 579 (CA8 1968)).

C

Respondents argue that, aside from the significant injury test applied by the Fifth Circuit, their conduct cannot constitute an Eighth Amendment violation because it was "isolated and unauthorized." Brief for Respondents 28. The beating of Hudson, they contend, arose from "a personal dispute between correctional security officers and a prisoner," and was against prison policy. *Ibid.* Respondents invoke the reasoning of courts that have held the use of force by prison officers under such circumstances beyond the scope of "punishment" prohibited by the Eighth Amendment. See *Johnson* v. *Glick*, *supra*, at 1032 ("[A]lthough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment'"); *George* v. *Evans*, 633 F. 2d 413, 416 (CA5 1980) ("[A] single, unauthorized assault by a guard does not constitute cruel and unusual pun-

ishment . . ."). But see *Duckworth* v. *Franzen*, 780 F. 2d 645, 652 (CA7 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . ."), cert. denied, 479 U. S. 816 (1986).

We take no position on respondents' legal argument because we find it inapposite on this record. The Court of Appeals left intact the Magistrate's determination that the violence at issue in this case was "not an isolated assault." App. 27, n. 1. Indeed, there was testimony that McMillian and Woods beat another prisoner shortly after they finished with Hudson. *Ibid.* To the extent that respondents rely on the unauthorized nature of their acts, they make a claim not addressed by the Fifth Circuit, not presented by the question on which we granted certiorari, and, accordingly, not before this Court. Moreover, respondents ignore the Magistrate's finding that Lieutenant Mezo, acting as a supervisor, "expressly condoned the use of force in this instance." App. 26.

The judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

In *Whitley* v. *Albers*, 475 U. S. 312 (1986), the Court held that injuries to prisoners do not constitute cruel and unusual punishment when they are inflicted during a prison disturbance that "indisputably poses significant risks to the safety of inmates and prison staff" unless force was applied "'maliciously and sadistically for the very purpose of causing harm.'" *Id.*, at 320–321 (citation omitted). The Court's opinion explained that the justification for that particularly high standard of proof was required by the exigencies present during a serious prison disturbance. "When the 'ever-present potential for violent confrontation and conflagration' ripens into *actual* unrest and conflict," *id.*, at 321 (citation omitted), then prison officials must be permitted to "take

into account the very real threats the unrest presents to inmates and prison officials alike." *Id.*, at 320.

Absent such special circumstances, however, the less demanding standard of "'unnecessary and wanton infliction of pain'" should be applied. *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)); see *Unwin* v. *Campbell*, 863 F. 2d 124, 135 (CA1 1988) (opinion of Campbell, C. J.) ("[W]here institutional security is not at stake, the officials' license to use force is more limited; to succeed, a plaintiff need not prove malicious and sadistic intent"); see also *Wyatt* v. *Delaney*, 818 F. 2d 21, 23 (CA8 1987). This approach is consistent with the Court's admonition in *Whitley* that the standard to be used is one that gives "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U. S., at 320. In this case, because there was no prison disturbance and "no need to use any force since the plaintiff was already in restraints," App. 27, the prison guards' attack upon petitioner resulted in the infliction of unnecessary and wanton pain. *Id.*, at 28.

Although I think that the Court's reliance on the malicious and sadistic standard is misplaced, I agree with the Court that even this more demanding standard was met here. Accordingly, I concur in Parts I, II–A, II–B, and II–C of the Court's opinion and in its judgment.

JUSTICE BLACKMUN, concurring in the judgment.

The Court today appropriately puts to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with "significant injury," *e. g.*, injury that requires medical attention or leaves permanent marks. Indeed, were we to hold to the contrary, we might place various kinds of state-sponsored torture and abuse—of the kind ingeniously designed to cause pain but without a telltale "significant

injury"—entirely beyond the pale of the Constitution. In other words, the constitutional prohibition of "cruel and unusual punishments" then might not constrain prison officials from lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs. These techniques, commonly thought to be practiced only outside this Nation's borders, are hardly unknown within this Nation's prisons. See, *e. g.*, *Campbell* v. *Grammer*, 889 F. 2d 797, 802 (CA8 1989) (use of high-powered fire hoses); *Jackson* v. *Bishop*, 404 F. 2d 571, 574–575 (CA8 1968) (use of the "Tucker Telephone," a hand-cranked device that generated electric shocks to sensitive body parts, and flogging with leather strap). See also *Hutto* v. *Finney*, 437 U. S. 678, 682, n. 5 (1978).

Because I was in the dissent in *Whitley* v. *Albers*, 475 U. S. 312, 328 (1986), I do not join the Court's extension of *Whitley*'s malicious-and-sadistic standard to all allegations of excessive force, even outside the context of a prison riot. Nevertheless, I otherwise join the Court's solid opinion and judgment that the Eighth Amendment does not require a showing of "significant injury" in the excessive-force context. I write separately to highlight two concerns not addressed by the Court in its opinion.

I

Citing rising caseloads, respondents, represented by the Attorney General of Louisiana, and joined by the States of Texas, Hawaii, Nevada, Wyoming, and Florida as *amici curiae*, suggest that a "significant injury" requirement is necessary to curb the number of court filings by prison inmates. We are informed that the "significant injury requirement has been very effective in the Fifth Circuit in helping to control its system-wide docket management problems." Brief for Texas et al. as *Amici Curiae* 15.

This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. Perhaps judicial overload is an appropriate concern in determining whether statutory standing to sue should be conferred upon certain plaintiffs. See, *e. g.*, *Associated General Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 529–546 (1983) (identifying "judge-made rules" circumscribing persons entitled to sue under § 4 of the Clayton Act); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737–749 (1975) (identifying judicial "policy" considerations limiting standing under § 10(b) of the Securities Exchange Act of 1934). But this inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right.

Since the burden on the courts is presumably worth bearing when a prisoner's suit has merit, the States' "concern" is more aptly termed a "conclusion" that such suits are simply without merit. One's experience on the federal bench teaches the contrary. Moreover, were particular classes of cases to be nominated for exclusion from the federal courthouse, we might look first to cases in which federal law is not sensitively at issue rather than to those in which fundamental constitutional rights are at stake. The right to file for legal redress in the courts is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner it is more valuable. Inasmuch as one convicted of a serious crime and imprisoned usually is divested of the franchise, the right to file a court action stands, in the words of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886), as his most "fundamental political right, because preservative of all rights."

Today's ruling, in any event, does not open the floodgates for filings by prison inmates. By statute, prisoners—alone among all other § 1983 claimants—are required to exhaust administrative remedies. See 94 Stat. 352, 42 U. S. C. § 1997e(a); *Patsy* v. *Board of Regents of Florida*, 457 U. S.

496, 507–512 (1982). Moreover, prison officials are entitled to a determination before trial whether they acted in an objectively reasonable manner, thereby entitling them to a qualified immunity defense. *Procunier* v. *Navarette*, 434 U. S. 555, 561–562 (1978); see also *Harlow* v. *Fitzgerald*, 457 U. S. 800, 817–818 (1982) (unsubstantiated allegations of malice are insufficient to overcome pretrial qualified immunity). Additionally, a federal district court is authorized to dismiss a prisoner's complaint *in forma pauperis* "if satisfied that the action is frivolous or malicious." 28 U. S. C. § 1915(d). These measures should be adequate to control any docket-management problems that might result from meritless prisoner claims.

II

I do not read anything in the Court's opinion to limit injury cognizable under the Eighth Amendment to physical injury. It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment. See, *e. g.*, *Wisniewski* v. *Kennard*, 901 F. 2d 1276, 1277 (CA5) (guard placing a revolver in inmate's mouth and threatening to blow prisoner's head off), cert. denied, 498 U. S. 926 (1990). The issue was not presented here, because Hudson did not allege that he feared that the beating incident would be repeated or that it had caused him anxiety and depression. See App. 29.

As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of "pain," rather than "injury." *Ante*, at 5. "Pain" in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary. See *Sierra Club* v. *Morton*, 405 U. S. 727, 734 (1972) (recognizing Article III standing for "aesthetic" injury); *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954) (identifying schoolchildren's

feelings of psychological inferiority from segregation in the public schools).

To be sure, as the Court's opinion intimates, *ante*, at 9, *de minimis* or nonmeasurable pain is not actionable under the Eighth Amendment. But psychological pain can be more than *de minimis*. Psychological pain often may be clinically diagnosed and quantified through well-established methods, as in the ordinary tort context where damages for pain and suffering are regularly awarded. I have no doubt that to read a "physical pain" or "physical injury" requirement into the Eighth Amendment would be no less pernicious and without foundation than the "significant injury" requirement we reject today.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

We granted certiorari in this case "limited to the following question," which we formulated for the parties:

> "'Did the Fifth Circuit apply the correct legal test when determining that petitioner's claim that his Eighth Amendment rights under the Cruel and Unusual Punishments Clause were not violated as a result of a single incident of force by respondents which did not cause a significant injury?'" 500 U. S. 903 (1991).

Guided by what it considers "the evolving standards of decency that mark the progress of a maturing society," *ante*, at 8 (internal quotation marks omitted), the Court today answers that question in the negative. I would answer it in the affirmative, and would therefore affirm the judgment of the Fifth Circuit. I respectfully dissent.

I

The Magistrate who found the facts in this case emphasized that petitioner's injuries were "minor." App. 26, 28. The three judges of the Fifth Circuit who heard the case on

appeal did not disturb that assessment, and it has not been challenged here. The sole issue in this case, as it comes to us, is a legal one: Must a prisoner who claims to have been subjected to "cruel and unusual punishments" establish at a minimum that he has suffered a significant injury? The Court today not only responds in the negative, but broadly asserts that *any* "unnecessary and wanton" use of physical force against a prisoner *automatically* amounts to cruel and unusual punishment, whenever more than *de minimis* force is involved. Even a *de minimis* use of force, the Court goes on to declare, inflicts cruel and unusual punishment where it is "repugnant to the conscience of mankind." *Ante*, at 10 (internal quotation marks omitted).[1] The extent to which a prisoner is *injured* by the force—indeed, whether he is injured at all—is in the Court's view irrelevant.

In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment. In concluding to the contrary, the Court today goes far beyond our precedents.

A

Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration. In *Weems* v. *United States*, 217 U. S. 349 (1910), the Court extensively chronicled the background of the Amendment, discussing its English antecedents, its adoption by Congress, its construction by this Court, and the in-

[1] This point is pure dictum, because the force here was surely not *de minimis*.

terpretation of analogous provisions by state courts. Nowhere does *Weems* even hint that the Clause might regulate not just criminal sentences but the treatment of prisoners. Scholarly commentary also viewed the Clause as governing punishments that were part of the sentence. See T. Cooley, Constitutional Limitations *329 ("It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment *declared by statute* for an offence which was punishable in the same way at the common law, could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be punished to the extent and in the mode permitted by the *common law* for offences of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual") (emphasis added). See also 3 J. Story, Commentaries on the Constitution of the United States 750–751 (1833).

Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment. Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life. "[I]t is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." *Stroud* v. *Swope*, 187 F. 2d 850, 851–852 (CA9), cert. denied, 342 U. S. 829 (1951). See also *Sutton* v. *Settle*, 302 F. 2d 286, 288 (CA8 1962) *(per curiam)*, cert. denied, 372 U. S. 930 (1963); *United States ex rel. Atterbury* v. *Ragen*, 237 F. 2d 953, 954–956 (CA7 1956), cert. denied, 353 U. S. 964 (1957); *Banning* v. *Looney*, 213 F. 2d 771 (CA10 1954) *(per curiam)*; *Sarshik* v. *Sanford*, 142 F. 2d 676 (CA5 1944). It

was not until 1976—185 years after the Eighth Amendment was adopted—that this Court first applied it to a prisoner's complaint about a deprivation suffered in prison. *Estelle* v. *Gamble*, 429 U. S. 97 (1976).

B

We made clear in *Estelle* that the Eighth Amendment plays a very limited role in regulating prison administration. The case involved a claim that prison doctors had inadequately attended an inmate's medical needs. We rejected the claim because the inmate failed to allege "acts or omissions sufficiently harmful to evidence *deliberate indifference* to *serious* medical needs." *Id.*, at 106 (emphasis added). From the outset, thus, we specified that the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* that narrow class of deprivations involving "serious" injury inflicted by prison officials acting with a culpable state of mind. We have since described these twin elements as the "objective" and "subjective" components of an Eighth Amendment prison claim. See *Wilson* v. *Seiter*, 501 U. S. 294, 298 (1991).

We have never found a violation of the Eighth Amendment in the prison context when an inmate has failed to establish either of these elements. In *Rhodes* v. *Chapman*, 452 U. S. 337 (1981), for instance, we upheld a practice of placing two inmates in a single cell on the ground that the injury alleged was insufficiently serious. Only where prison conditions deny an inmate "the minimal civilized measure of life's necessities," *id.*, at 347, we said, could they be considered cruel and unusual punishment. Similarly, in *Whitley* v. *Albers*, 475 U. S. 312 (1986), we held that a guard did not violate the Eighth Amendment when he shot an inmate during a prison riot because he had not acted with a sufficiently culpable state of mind. When an official uses force to quell a riot, we said, he does not violate the Eighth Amendment unless he acts "'maliciously and sadistically for the very purpose of

causing harm.'" *Id.*, at 320–321 (quoting *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2) (Friendly, J.), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973)).

We synthesized our Eighth Amendment prison jurisprudence last Term in *Wilson, supra.* There the inmate alleged that the poor conditions of his confinement *per se* amounted to cruel and unusual punishment, and argued that he should not be required in addition to establish that officials acted culpably. We rejected that argument, emphasizing that an inmate seeking to establish that a prison deprivation amounts to cruel and unusual punishment always must satisfy *both* the "objective component . . . (Was the deprivation sufficiently serious?)" *and* the "subjective component (Did the officials act with a sufficiently culpable state of mind?)" of the Eighth Amendment. *Id.*, at 298. Both are necessary components; neither suffices by itself.

These subjective and objective components, of course, are implicit in the traditional Eighth Amendment jurisprudence, which focuses on penalties meted out by statutes or sentencing judges. Thus, if a State were to pass a statute ordering that convicted felons be broken at the wheel, we would not separately inquire whether the legislature had acted with "deliberate indifference," since a statute, as an intentional act, necessarily satisfies an even higher state-of-mind threshold. Likewise, the inquiry whether the deprivation is objectively serious would be encompassed within our determination whether it was "cruel and unusual."

When we cut the Eighth Amendment loose from its historical moorings and applied it to a broad range of prison deprivations, we found it appropriate to make explicit the limitations described in *Estelle, Rhodes, Whitley,* and *Wilson.* "If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify," *Wilson,* 501 U. S., at 300 (emphasis in original)—thus, the subjective component. Similarly, because deprivations

of all sorts are the very essence of imprisonment, we made explicit the *serious* deprivation requirement to ensure that the Eighth Amendment did not transfer wholesale the regulation of prison life from executive officials to judges. That is why, in *Wilson*, we described the inquiry mandated by the objective component as: "[W]as the deprivation *sufficiently serious?*" *Id.*, at 298 (emphasis added). That formulation plainly reveals our prior assumption that a serious deprivation is *always* required. Under that analysis, a court's task in any given case was to determine whether the challenged deprivation was "sufficiently" serious. It was not, as the Court's interpretation today would have it, to determine whether a "serious" deprivation *is required at all.*[2]

C

Given *Estelle*, *Rhodes*, *Whitley*, and *Wilson*, one might have assumed that the Court would have little difficulty answering the question presented in this case by upholding the Fifth Circuit's "significant injury" requirement.[3] Instead, the Court announces that "[t]he objective component of an Eighth Amendment claim is . . . contextual and responsive to contemporary standards of decency." *Ante*, at 8 (internal quotation marks omitted). In the context of claims alleging the excessive use of physical force, the Court then asserts, the serious deprivation requirement is satisfied by no serious deprivation at all. "When prison officials maliciously and

---

[2] While granting petitioner relief on his Eighth Amendment claim, the Court leaves open the issue whether isolated and unauthorized acts are "punishment" at all. This will, of course, be the critical question in future cases of this type. If we ultimately decide that isolated and unauthorized acts are not "punishment," then today's decision is a dead letter. That anomaly simply highlights the artificiality of applying the Eighth Amendment to prisoner grievances, whether caused by the random misdeeds of prison officials or by official policy.

[3] I do not believe that there is any substantive difference between the "serious deprivation" requirement found in our precedents and the Fifth Circuit's "significant injury" requirement.

sadistically use force to cause harm, contemporary standards of decency always are violated." *Ante*, at 9. Ascertaining prison officials' state of mind, in other words, is the *only* relevant inquiry in deciding whether such cases involve cruel and unusual punishment. In my view, this approach is an unwarranted and unfortunate break with our Eighth Amendment prison jurisprudence.

The Court purports to derive the answer to this case from *Whitley*. The sum and substance of an Eighth Amendment violation, the Court asserts, is "'"the unnecessary and wanton infliction of pain."'" *Ante*, at 5 (quoting *Whitley*, 475 U. S., at 319). This formulation has the advantage, from the Court's perspective, of eliminating the objective component. As noted above, however, the only dispute in *Whitley* concerned the subjective component; the prisoner, who had been shot, had self-evidently been subjected to an objectively serious injury. *Whitley* did not say, as the Court does today, that the *objective* component is contextual, and that an Eighth Amendment claim may succeed where a prisoner is not seriously injured. Rather, *Whitley* stands for the proposition that, assuming the existence of an objectively serious deprivation, the culpability of an official's state of mind depends on the context in which he acts. "*Whitley* teaches that, *assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim*, see *Rhodes* v. *Chapman*, 452 U. S. 337 (1981), whether it can be characterized as 'wanton' depends upon the constraints facing the official." *Wilson*, *supra*, at 303 (emphasis modified). Whether officials subject a prisoner to the "unnecessary and wanton infliction of pain" is simply one way to describe the *state of mind inquiry* that was at issue in *Whitley* itself. As *Wilson* made clear, that inquiry is *necessary* but not *sufficient* when a prisoner seeks to show that he has been subjected to cruel and unusual punishment.

Perhaps to compensate for its elimination of the *objective* component in excessive force cases, the Court simultane-

ously makes it harder for prisoners to establish the *subjective* component. As we explained in *Wilson*, "deliberate indifference" is the baseline mental state required to establish an Eighth Amendment violation. 501 U. S., at 303. Departure from this baseline is justified where, as in *Whitley*, prison officials act in response to an emergency; in such situations their conduct cannot be characterized as "wanton" unless it is taken "maliciously and sadistically for the very purpose of causing harm." 475 U. S., at 320–321 (internal quotation marks omitted). The Court today extends the heightened mental state applied in *Whitley* to *all* excessive force cases, even where no competing institutional concerns are present. The Court simply asserts that "[m]any of the concerns underlying our holding in *Whitley* arise *whenever* guards use force to keep order." *Ante*, at 6 (emphasis added). I do not agree. Many excessive force cases do not arise from guards' attempts to "keep order." (In this very case, the basis for petitioner's Eighth Amendment claim is that the guards hit him when there was no need for them to use any force at all.) The use of excessive physical force is by no means invariably (in fact, perhaps not even predominantly) accompanied by a "malicious and sadistic" state of mind. I see no justification for applying the extraordinary *Whitley* standard to *all* excessive force cases, without regard to the constraints facing prison officials. The Court's unwarranted extension of *Whitley*, I can only suppose, is driven by the implausibility of saying that minor injuries imposed upon prisoners with anything less than a "malicious and sadistic" state of mind can amount to cruel and unusual punishment.

D

The Court's attempts to distinguish the cases expressly resting upon the objective component are equally unconvincing. As noted above, we have required an extreme deprivation in cases challenging conditions of confinement, *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). Why should such an ob-

jectively serious deprivation be required there and not here? The Court's explanation is that "routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.'" *Ante*, at 9 (quoting *Rhodes*, *supra*, at 347). But there is quite a gap between "routine discomfort" and the denial of "the minimal civilized measure of life's necessities" required to establish an Eighth Amendment violation. In the Court's view, then, our society's standards of decency are not violated by anything short of uncivilized conditions of confinement (no matter how malicious the mental state of the officials involved), but are automatically violated by any malicious use of force, regardless of whether it even causes an injury. This is puzzling. I see no reason why our society's standards of decency should be more readily offended when officials, with a culpable state of mind, subject a prisoner to a deprivation on one discrete occasion than when they subject him to continuous deprivations over time. If anything, I would think that a deprivation inflicted continuously over a long period would be of greater concern to society than a deprivation inflicted on one particular occasion.[4]

The Court's attempted distinction of *Estelle* is also unpersuasive: "Because society does not expect that prisoners will

---

[4] Moreover, by distinguishing this case from "conditions" cases, the Court resurrects a distinction that we have repudiated as "not only unsupportable in principle but unworkable in practice." *Wilson* v. *Seiter*, 501 U. S. 294, 299, and n. 1 (1991). When officials use force against a prisoner, whether once or every day, that is a "condition" of his confinement. It is unwise, in my view, to make the very existence of the serious deprivation requirement depend on whether a particular claim is characterized as one challenging a "condition" or one challenging a "specific act." Cf. *McCarthy* v. *Bronson*, 500 U. S. 136, 139, 143 (1991) ("[C]onditions of confinement" under 28 U. S. C. §636(b)(1)(B) include not only challenges to ongoing prison conditions but also challenges to "isolated incidents" of excessive force, in part because "the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify").

have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'" *Ante*, at 9. In my view, our society similarly has no expectation that prisoners will have "unqualified" freedom from force, since forcibly keeping prisoners in detention is what prisons are all about. Why should the seriousness of injury matter when doctors maliciously decide not to treat an inmate, but not when guards maliciously decide to strike him?

At bottom, of course, there is no conclusive way to refute the Court's assertions about our society's "contemporary notions of decency." That is precisely why this Court has long insisted that determinations of whether punishment is cruel and unusual "should be informed by objective factors to the maximum possible extent," *Rhodes*, *supra*, at 346 (internal quotation marks omitted).

The Court attempts to justify its departure from precedent by saying that if a showing of serious injury were required, "the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." *Ante*, at 9. That statement, in my view, reveals a central flaw in the Court's reasoning. "[D]iabolic or inhuman" punishments *by definition* inflict serious injury. That is not to say that the injury must be, or always will be, *physical*. "Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999'—may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks." *Williams* v. *Boles*, 841 F. 2d 181, 183 (CA7 1988). Surely a prisoner who alleges that prison officials tortured him with a device like the notorious "Tucker Telephone" described by JUSTICE BLACKMUN, *ante*, at 14, has alleged a serious injury. But petitioner has not alleged a deprivation of this type; the injuries he has alleged are entirely physical and were found below to be "minor."

Furthermore, to characterize the serious injury requirement as "arbitrary" is not to explain why it should be eliminated in this particular context while it remains applicable to all other prison deprivations. To be sure, it will not always be obvious which injuries are "serious." But similarly, it will not always be obvious which medical needs are "serious," or which conditions of confinement deny "the minimal civilized measure of life's necessities." These determinations are, however, required by the Eighth Amendment, which prohibits *only* those punishments that are "cruel and unusual." As explained above, I think our precedents clearly establish that a prisoner seeking to prove that he has been subjected to "cruel and unusual" punishment must always show that he has suffered a serious deprivation.

If the Court is to be taken at its word that "the unnecessary and wanton infliction of pain" upon a prisoner *per se* amounts to cruel and unusual punishment, the implications of today's opinion are sweeping. For this formulation replaces the objective component described in our prior cases with a "necessity" component. Many prison deprivations, however, are not "necessary," at least under any meaningful definition of that word. Thus, under today's analysis, *Rhodes* was wrongly decided. Surely the "double celling" of inmates was not "necessary" to fulfill the State's penal mission; in fact, the prison in that case had been designed for individual cells, but was simply overcrowded. 452 U. S., at 343. We rejected the prisoners' claim in *Rhodes* not because we determined that double celling was "necessary," but because the deprivations alleged were not sufficiently serious to state a claim of cruel and unusual punishment. After today, the "necessity" of a deprivation is apparently the only relevant inquiry beyond the wantonness of official conduct. This approach, in my view, extends the Eighth Amendment beyond all reasonable limits.

II

Today's expansion of the Cruel and Unusual Punishments Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society. Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation. To reject the notion that the infliction of concededly "minor" injuries can be considered either "cruel" or "unusual" punishment (much less cruel *and* unusual punishment) is not to say that it amounts to acceptable conduct. Rather, it is to recognize that primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution but with the laws and regulations of the various States.

Petitioner apparently could have, but did not, seek redress for his injuries under state law.[5] Respondents concede that

---

[5] According to respondents:

"Louisiana state courts are open to prisoners for the purpose of suing prison personnel who have caused them unjustified wrongs. For example, *see Parker* v. *State*, 282 So. 2d 483, 486–87 (La. 1973), *cert. denied*, 414 U. S. 1093 (1973); *Anderson* v. *Phelps*, 451 So. 2d 1284, 1285 (La. Ct. App. 1st Cir. 1984); *McGee* v. *State*, 417 So. 2d 416, 418 (La. Ct. App. 1st Cir.), *writ denied*, 420 So. 2d 871 (La. 1982); *Neathery* v. *State*, 395 So. 2d 407, 410 (La. Ct. App. 3d Cir. 1981); *Shields* v. *State Through Dep't of Corrections*, 380 So. 2d 123 (La. Ct. App. 1st Cir. 1979), *writ denied*, 382 So. 2d 164; *Craft* v. *State*, 308 So. 2d 290, 295 (La. Ct. App. 1st Cir.), *writ denied*, 319 So. 2d 441 (La. 1975), *cert. denied*, 423 U. S. 1075, 96 S. Ct. 859, 47 L. Ed. 2d 84 (1975); *Lewis* v. *Listi*, 377 So. 2d 551, 553 (La. Ct. App. 3d Cir. 1979); *Bastida* v. *State*, 269 So. 2d 544, 545 (La. Ct. App. 1st Cir. 1972); *Adams* v. *State*, 247 So. 2d 149, 151 (La. Ct. App. 1st Cir. 1971); *St. Julian* v. *State*, 98 So. 2d 284 (La. Ct. App. 1st Cir. 1957); *Nedd* v. *State*, 281 So. 2d 131, 132 (La. 1973), *cert. denied*, 415 U. S. 957, 94 S. Ct. 1484, 39 L. Ed. 2d 572 (1974); *Mack* v. *State*, 529 So. 2d 446, 448 (La. Ct. App. 1st Cir. 1988), *writ denied*, 533 So. 2d 359 (La. 1988); *Walden* v. *State*, 430 So. 2d 1224 (La. Ct. App. 1st Cir. 1983), *writ denied*, 435 So. 2d 430 (La. 1983);

if available state remedies were not constitutionally adequate, petitioner would have a claim under the Due Process Clause of the Fourteenth Amendment. Cf. *Davidson* v. *Cannon*, 474 U. S. 344, 348 (1986); *Hudson* v. *Palmer*, 468 U. S. 517, 532–534 (1984); *Parratt* v. *Taylor*, 451 U. S. 527, 541 (1981). I agree with respondents that this is the appropriate, and appropriately limited, federal constitutional inquiry in this case.

Because I conclude that, under our precedents, a prisoner seeking to establish that he has been subjected to cruel and unusual punishment must always show that he has suffered a serious injury, I would affirm the judgment of the Fifth Circuit.

White v. *Phelps*, 387 So. 2d 1188 (La. Ct. App. 1st Cir. 1980); *Hampton* v. *State*, 361 So. 2d 257, 258 (La. Ct. App. 1st Cir. 1978); *Davis* v. *State*, 356 So. 2d 452, 454 (La. Ct. App. 1st Cir. 1977); *Betsch* v. *State*, 353 So. 2d [358], 359 (La. Ct. App. 1st Cir. 1977), *writ refused*, 354 So. 2d 1389 (La. 1978); *Williams* v. *State*, 351 So. 2d 1273 (La. Ct. App. 1st Cir. 1977); *Jones* v. *State*, 346 So. 2d 807, 808 (La. Ct. App. 1st Cir.), *writ refused*, 350 So. 2d 671 (La. 1977); *Walker* v. *State*, 346 So. 2d 794, 796 (La. Ct. App. 1st Cir.), *writ denied*, 349 So. 2d 879 (La. 1977); *Raney* v. *State*, 322 So. 2d 890 (La. Ct. App. 1st Cir. 1975); and *Bay* v. *Maggio*, 417 So. 2d 1386 (La. Ct. App. 1st Cir. 1982)." Brief for Respondents 42–43, n. 38.

Petitioner has not disputed the existence or adequacy of state-law remedies for his injuries.

Syllabus

UNITED STATES *v.* NORDIC VILLAGE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90–1629. Argued December 9, 1991—Decided February 25, 1992

After respondent Nordic Village, Inc., filed a petition for relief under Chapter 11 of the Bankruptcy Code, one of its officers withdrew funds from the company's corporate account. He sent part of the money to the Internal Revenue Service (IRS), directing it to apply the funds against his individual tax liability, which it did. In a subsequent adversary proceeding, the Bankruptcy Court permitted Nordic Village's trustee to recover the transfer and entered a monetary judgment against the IRS. The District Court affirmed, as did the Court of Appeals, which rejected a jurisdictional defense that sovereign immunity barred the judgment.

Held:

1. Section 106(c) of the Code does not waive the United States' sovereign immunity from an action seeking monetary recovery in bankruptcy. Pp. 32–37.

(a) *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96, does not control this case, since the plurality and the dissent therein were evenly divided over the issue whether § 106(c) authorizes a monetary recovery against a State, and since the deciding vote of the concurrence, denying amenability to suit, rested upon the Eleventh Amendment, which is applicable only to the States. However, the plurality's reasoning is relevant and is relied on here. Pp. 32–33.

(b) Section 106(c) does not "unequivocally express" a waiver of the Government's immunity from actions for monetary relief, as is necessary for such a waiver to be effective. See, *e. g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95. In contrast to §§ 106(a) and (b), which plainly waive immunity with regard to monetary relief as to specified claims, § 106(c) is susceptible of at least two plausible interpretations that do *not* authorize monetary relief. Legislative history has no bearing on this point, for the "unequivocal expression" of waiver must be an expression in statutory text. *Hoffman*, *supra*, at 104. Pp. 33–37.

2. Respondent's several alternative grounds for affirming the judgment below—that 28 U. S. C. § 1334(d)'s broad jurisdictional grant provides the necessary waiver, that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity, and that a waiver of sovereign immunity is supported by trust law principles—are unpersuasive. Pp. 37–39.

915 F. 2d 1049, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 39.

Richard H. Seamon argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Roberts, Gary D. Gray,* and *John A. Dudeck, Jr.*

Marvin A. Sicherman argued the cause and filed a brief for respondent. With him on the brief was *Michael D. Zaverton.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents a narrow question: Does § 106(c) of the Bankruptcy Code waive the sovereign immunity of the United States from an action seeking monetary recovery in bankruptcy?

I

Respondent Nordic Village, Inc., filed a petition for relief under Chapter 11 of the Bankruptcy Code in March 1984. About four months later, Josef Lah, an officer and shareholder of Nordic Village, drew a $26,000 check on the company's corporate account, $20,000 of which was used to obtain a cashier's check in that amount payable to the Internal Revenue Service (IRS). Lah delivered this check to the IRS and directed it to apply the funds against his individual tax liability, which it did.

In December 1984, the trustee appointed for Nordic Village commenced an adversary proceeding in the Bankruptcy Court for the Northern District of Ohio, seeking to recover, among other transfers, the $20,000 paid by Lah to the IRS. The Bankruptcy Court permitted the recovery. The unauthorized, postpetition transfer, the court determined, could be avoided under § 549(a) and recovered from the IRS under § 550(a) of the Bankruptcy Code. It entered a judgment against the IRS in the amount of $20,000, which the District Court affirmed.

A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed. 915 F. 2d 1049 (1990). It upheld the reasoning of the lower courts and rejected a jurisdictional defense (raised for the first time on appeal) that sovereign immunity barred the judgment entered against the Government. We granted certiorari. 501 U. S. 1216 (1991).

II

Section 106 of the Bankruptcy Code provides:

> "(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> "(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> "(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> "(1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and
>
> "(2) a determination by the court of an issue arising under such a provision binds governmental units." 11 U. S. C. § 106.

Three Terms ago we construed this provision in *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96 (1989). The issue there was whether § 106(c) authorizes a monetary recovery against a State. We held that it does not, though the Justices supporting that judgment failed to agree as to why. A plurality of the Court determined that § 106(c) does not permit a bankruptcy court to issue mone-

tary relief against a State. *Id.*, at 102 (WHITE, J., joined by REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ.). That conclusion, the plurality said, was compelled by the language of § 106(c), the relationship between that subsection and the rest of the statute, and the requirement that congressional abrogation of the States' Eleventh Amendment immunity be clearly expressed. The concurrence found it unnecessary to construe the statute, concluding that Congress lacks authority under the Bankruptcy Clause to abrogate the States' immunity from money-damages actions. *Id.*, at 105 (SCALIA, J., concurring in judgment). Like the Court of Appeals here, a dissent determined that the language of § 106(c), particularly that of paragraph (c)(1), supplies the necessary waiver. *Id.*, at 106 (Marshall, J., joined by Brennan, BLACKMUN, and STEVENS, JJ.).

Contrary to the Government's suggestion, *Hoffman* does not control today's decision. It is true, to be sure, that Congress made clear in § 106 that (insofar as is within Congress' power) state and federal sovereigns are to be treated the same for immunity purposes. See 11 U. S. C. § 101(27) (1982 ed., Supp. II) ("'governmental unit' means United States [and] State"). Since, however, the Court in *Hoffman* was evenly divided over what that treatment *was* as to the States; and since the deciding vote of the concurrence, denying amenability to suit, rested upon a ground (the Eleventh Amendment) applicable only to the States and not to the Federal Government, see *Federal Housing Authority* v. *Burr*, 309 U. S. 242, 244 (1940); the holding in *Hoffman* has no binding force here. The separate opinions dealing with the statutory question are relevant, however, and we shall in fact rely on the reasoning of the plurality.

III

Waivers of the Government's sovereign immunity, to be effective, must be "'unequivocally expressed.'" *Irwin* v.

Department of Veterans Affairs, 498 U. S. 89, 95 (1990) (quoting *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980), and *United States* v. *King*, 395 U. S. 1, 4 (1969)). Contrary to respondent's suggestion, moreover, they are not generally to be "liberally construed." We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the "sweeping language" of the Federal Tort Claims Act, *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 547 (1951), see, *e. g.*, *id.*, at 554–555, *Block* v. *Neal*, 460 U. S. 289, 298 (1983), *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383 (1949), or as in the context of equally broad "sue and be sued" clauses, see, *e. g.*, *Franchise Tax Bd. of California* v. *United States Postal Service*, 467 U. S. 512, 517–519 (1984), *FHA* v. *Burr*, *supra*, at 245. These cases do not, however, eradicate the traditional principle that the Government's consent to be sued "must be 'construed strictly in favor of the sovereign,' *McMahon* v. *United States*, 342 U. S. 25, 27 (1951), and not 'enlarge[d] . . . beyond what the language requires,'" *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685 (1983) (quoting *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 686 (1927)), a rule of construction that we have had occasion to reaffirm once already this Term, see *Ardestani* v. *INS*, 502 U. S. 129, 137 (1991).

Subsections (a) and (b) of § 106 meet this "unequivocal expression" requirement with respect to monetary liability. Addressing "claim[s]," which the Code defines as "right[s] to payment," § 101(4)(A), they plainly waive sovereign immunity with regard to monetary relief in two settings: compulsory counterclaims to governmental claims, § 106(a); and permissive counterclaims to governmental claims capped by a setoff limitation, § 106(b). Next to these models of clarity stands subsection (c). Though it, too, waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims. It is susceptible of at least two interpretations that do *not* authorize monetary relief.

Under one interpretation, § 106(c) permits the bankruptcy court to issue "declaratory and injunctive"—though not monetary—relief against the Government. *Hoffman*, 492 U. S., at 102. This conclusion is reached by reading the two paragraphs of subsection (c) as complementary rather than independent: The first paragraph identifies the subject matter of disputes that courts may entertain under the subsection and the second paragraph describes the relief that courts may grant in such disputes. That is to say, the second paragraph specifies the *manner* in which there shall be applied to governmental units the provisions identified by the first paragraph, *i. e.*, a manner that permits declaratory or injunctive relief but not an affirmative monetary recovery.

Several factors favor this construction. The distinction it establishes—between suits for monetary claims and suits for other relief—is a familiar one, and is suggested by the contrasting language used in subsections (a) and (b) ("claim[s]") and in subsection (c) ("determination[s]" of "issue[s]"), *Hoffman*, 492 U. S., at 102. It also avoids eclipsing the carefully drawn limitations placed on the waivers in subsections (a) and (b). The principal provision of the Code permitting the assertion of claims against persons other than the estate itself is § 542(b), which provides that "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee." If the first paragraph of § 106(c) means that, by reason of use of the trigger word "entity," this provision applies *in all respects* to governmental units, then the Government may be sued on all alleged debts, despite the prior specification in subsections (a) and (b) that claims against the Government will lie only when the Government has filed a proof of claim, and even then only as a setoff unless the claim is a compulsory counterclaim. Those earlier limitations are reduced to trivial application if paragraph (c)(1) stands on its own. See *id.*, at 101–102. This construction also attaches practical consequences to para-

graph (c)(2), whereas respondent's interpretation violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect. See *id.*, at 103; *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955). Respondent has suggested no function to be performed by paragraph (2) if paragraph (1) operates to treat the Government like any other "entity" or "creditor," regardless of the type of relief authorized by an applicable Code provision.

Under this interpretation, § 106(c), though not authorizing claims for monetary relief, would nevertheless perform a significant function. It would permit a bankruptcy court to determine the amount and dischargeability of an estate's liability to the Government, such as unpaid federal taxes, see 11 U. S. C. § 505(a)(1) (permitting the court to "*determine* the amount or legality of any tax") (emphasis added), whether or not the Government filed a proof of claim. See 492 U. S., at 102–103. Cf. *Neavear* v. *Schweiker*, 674 F. 2d 1201, 1203–1204 (CA7 1982) (holding that under § 106(c) a bankruptcy court could discharge a debt owed to the Social Security Administration). The Government had repeatedly objected, on grounds of sovereign immunity, to being bound by such determinations before § 106(c) was enacted in 1978. See, *e. g.*, *McKenzie* v. *United States*, 536 F. 2d 726, 728–729 (CA7 1976); *Bostwick* v. *United States*, 521 F. 2d 741, 742–744 (CA8 1975); *Gwilliam* v. *United States*, 519 F. 2d 407, 410 (CA9 1975); *In re Durensky*, 377 F. Supp. 798, 799–800 (ND Tex. 1974), appeal dism'd, 519 F. 2d 1024 (CA5 1975).

Subsection (c) is also susceptible of another construction that would not permit recovery here. If the two paragraphs of § 106(c) are read as being independent, rather than the second as limiting the first, then, pursuant to the first paragraph, Code provisions using the triggering words enumerated in paragraph (c)(1) would apply fully to governmental units. But that application of those provisions would be limited by the requirements of subsections (a) and (b), in accord-

ance with the phrase that introduces subsection (c) ("Except as provided in subsections (a) and (b) of this section"). This exception, in other words, could be read to mean that the rules established in subsections (a) and (b) for waiver of Government "claim[s]" that are "property of the estate" are exclusive, and preclude any resort to subsection (c) for that purpose. That reading would bar the present suit, since the right to recover a postpetition transfer under § 550 is clearly a "claim" (defined in § 101(4)(A)) and is "property of the estate" (defined in § 541(a)(3)). (The dissent appears to read paragraphs (c)(1) and (c)(2) as being independent but provides no explanation of what the textual exception could mean under that reading.)

The foregoing are assuredly not the only readings of subsection (c), but they are plausible ones—which is enough to establish that a reading imposing monetary liability on the Government is not "unambiguous" and therefore should not be adopted. Contrary to respondent's suggestion, legislative history has no bearing on the ambiguity point. As in the Eleventh Amendment context, see *Hoffman*, *supra*, at 104, the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report. Cf. *Dellmuth* v. *Muth*, 491 U. S. 223, 228–229 (1989).

IV

Respondent proposes several alternative grounds for affirming the judgment below, all unpersuasive. First, it claims that the necessary waiver can be found in 28 U. S. C. § 1334(d), which grants the district court in which a bankruptcy case is initiated "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." Respondent urges us to construe this language as empowering a bankruptcy court to compel the United States or a State to return any property, including money, that passes into the

estate upon commencement of the bankruptcy proceeding. Under this theory, a sovereign's exposure to suit would not be governed by the specific language of § 106, but would be concealed in the broad jurisdictional grant of § 1334(d). Besides being unprecedented and running afoul of the unequivocal-expression requirement, this theory closely resembles an argument we rejected just last Term. In *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 786 (1991), the argument was made that Alaska's Eleventh Amendment immunity to suit was abrogated by 28 U. S. C. § 1362, a jurisdictional grant, akin to § 1334(d), that gives district courts jurisdiction over "all civil actions, brought by any Indian tribe . . . aris[ing] under the Constitution, laws, or treaties of the United States." Rejecting that contention, we observed: "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id.*, at 787, n. 4.

Equally unpersuasive is respondent's related argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity. As an initial matter, the premise for that argument is missing here, since respondent did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction. Respondent sought to recover a sum of money, not "particular dollars," cf. *Begier* v. *IRS*, 496 U. S. 53, 62 (1990) (emphasis deleted), so there was no *res* to which the court's *in rem* jurisdiction could have attached, see *Pennsylvania Turnpike Comm'n* v. *McGinnes*, 268 F. 2d 65, 66–67 (CA3), cert. denied, 361 U. S. 829 (1959). In any event, we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists, see *United States* v. *Shaw*, 309 U. S. 495, 502–503 (1940). Nor does *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198 (1983), establish such an exception, or otherwise permit the relief requested here. That case upheld a Bankruptcy Court order that the IRS

turn over tangible property of the debtor it had seized before the debtor filed for bankruptcy protection. A suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership. The Court's opinion in *Whiting Pools* contains no discussion of § 106(c), and nothing in it suggests that an order granting monetary recovery from the United States would be proper.

Resort to the principles of trust law is also of no help to respondent. Most of the trust decisions respondent cites are irrelevant, since they involve private entities, not the Government. The one that does involve the Government, *Bull* v. *United States*, 295 U. S. 247 (1935), concerns equitable recoupment, a doctrine that has been substantially narrowed by later cases, see *United States* v. *Dalm*, 494 U. S. 596, 608 (1990), and has no application here.

* * *

Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief. Since Congress has not empowered a bankruptcy court to order a recovery of money from the United States, the judgment of the Court of Appeals must be reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The injustice that the Court condones today demonstrates that it is time to reexamine the wisdom of the judge-made rules that drive its decision.

An officer of an insolvent corporation appropriated corporate funds and used them to discharge a personal tax obligation. Because the Federal Government was the ultimate recipient of the stolen property, the Court holds that the

bankruptcy trustee cannot avoid the transfer. The interest in a rigid interpretation of the doctrine of sovereign immunity outweighs the interest in equitable treatment of general creditors and shareholders of the corporate debtor. This result is neither necessary nor just.

It is not necessary because both the text and the legislative history of the Bankruptcy Code support a contrary result. It is not just because nothing more than a misguided interest in adherence to obsolete judge-made rules is at stake. I shall comment first on the laws enacted by Congress and then on the rules that the Court itself has ordained.

I

The text of § 106 is straightforward. Because the case does not involve either a counterclaim or an offset, subsections (a) and (b) are not applicable. Subsection (c) provides:

> "(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> "(1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and
>
> "(2) a determination by the court of an issue arising under such a provision binds governmental units." 11 U. S. C. § 106(c).

The United States is a "governmental unit,"[1] and therefore any provision of the Bankruptcy Code that contains one of the "trigger words" listed in paragraph (c)(1) applies to the United States. Section 550(a) is undoubtedly one such pro-

[1] Section 101(27) defines the term "governmental unit" to include the "United States [and any] department, agency, or instrumentality of the United States." 11 U. S. C. § 101(27) (1988 ed., Supp. II).

vision.[2] Thus, "notwithstanding any assertion of sovereign immunity," paragraph (c)(1) provides that § 550(a) "applies" to the United States, and paragraph (c)(2) provides that the Government is bound by the court's determination of the issues arising under that provision. The literal text of the Act unquestionably forecloses the defense of sovereign immunity.

The legislative history unambiguously demonstrates that Congress intended the statute to be read literally. The immediate purpose of § 106(c) was to enable the bankruptcy court to determine the amount and the dischargeability of the debtor's tax liabilities, but the sponsors of the amendment clearly stated that it covered "other matters as well," specifically including the avoidance of preferential transfers. 124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); *id.*, at 33993 (statement of Sen. DeConcini).[3] The congressional purpose to waive sovereign immunity is pellucidly clear.

The Court evades this conclusion by hypothesizing "plausible" alternative constructions of the statute,[4] by refusing to consider its legislative history,[5] and by reiterating the

---

[2] Section 550(a) provides:

"(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

"(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

"(2) any immediate or mediate transferee of such initial transferee."

[3] See also the material summarized and quoted in my dissenting opinion in *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96, 111–114 (1989). Particularly note the sponsors' comment that "'§ 106(c) permits a trustee or debtor in possession to assert avoiding powers under Title 11 against a governmental unit,'" *id.*, at 112, and the comment that as a result of § 106(c) "'the government is subject to avoidance of preferential transfers,'" *id.*, at 113.

[4] *Ante*, at 34–37.

[5] *Ante*, at 37.

Court's view that waivers of sovereign immunity must be strictly construed.[6] I shall not comment on the plausible alternatives except to note that they are obviously less satisfactory—both as a matter of sound bankruptcy policy and as a principled interpretation of the English language—than a literal reading of the statute. I shall, however, add a few words about the Court's love affair with the doctrine of sovereign immunity.

II

Despite its ancient lineage, the doctrine of sovereign immunity is nothing but a judge-made rule that is sometimes favored[7] and sometimes disfavored.[8] Its original reliance on the notion that a divinely ordained monarch "can do no wrong"[9] is, of course, thoroughly discredited.[10] Moreover,

---

[6] *Ante*, at 34.

[7] See, *e. g.*, *Library of Congress* v. *Shaw*, 478 U. S. 310, 318 (1986) ("'The consent necessary to waive the traditional immunity must be express, and it must be strictly construed'") (quoting *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 659 (1947)); *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685 (1983) ("Waivers of immunity must be 'construed strictly in favor of the sovereign,' . . . and not 'enlarge[d] . . . beyond what the language requires'"); *United States* v. *Sherwood*, 312 U. S. 584, 590 (1941) (Because "a relinquishment of a sovereign immunity . . . must be strictly interpreted," we construe the statutory language with "conservatism").

[8] See, *e. g.*, *Block* v. *Neal*, 460 U. S. 289, 298 (1983) ("'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced'") (quoting *Anderson* v. *Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30 (1926) (Cardozo, J.)); *Indian Towing Co.* v. *United States*, 350 U. S. 61, 69 (1955) (Frankfurter, J.) (Court should not be "a self-constituted guardian of the Treasury [and] import immunity back into a statute designed to limit it"); *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 222 (1945) (Court should not thwart the "broad statutory language authorizing suit" against the United States with "an unduly restrictive interpretation").

[9] See 1 W. Blackstone, Commentaries *246.

[10] See, *e. g.*, *Nevada* v. *Hall*, 440 U. S. 410, 415 (1979) (the fiction that the king could do no wrong "was rejected by the colonists when they declared

its persistent threat to the impartial administration of justice has been repeatedly acknowledged and recognized.[11] Thus, in *Federal Housing Authority* v. *Burr*, 309 U. S. 242, 245 (1940), we remarked on "the current disfavor of the doctrine of governmental immunity from suit."[12]

Time after time Congress has taken action to ameliorate the hardship of the doctrine. A half century ago this Court observed:

> "A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed." *United States* v. *Shaw*, 309 U. S. 495, 501 (1940).

In the bankruptcy context, the Court has noted that there is no reason why the Federal Government should be treated

---

their independence from the Crown"); *Langford* v. *United States*, 101 U. S. 341, 343 (1880) ("We do not understand that . . . the English maxim [that the king can do no wrong] has an existence in this country").

[11] See, *e. g.*, Davis, Sovereign Immunity Must Go, 22 Admin. L. Rev. 383, 383–384, 389–393 (1969); Pugh, Historical Approach to the Doctrine of Sovereign Immunity, 13 La. L. Rev. 476, 492 (1953); Borchard, Government Liability in Tort, 34 Yale L. J. 1, 1–2, 31, 33 (1924).

[12] Many legal scholars have been similarly critical of the doctrine. See, *e. g.*, Comment, Sovereign Immunity—An Anathema to the "Constitutional Tort," 12 Santa Clara Law. 543, 553, and n. 60 (1972) (collecting authorities); Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387, 418–419 (1970); Davis, *supra* n. 11; Pugh, *supra* n. 11, at 494.

Recognizing the lack of current justification for and the inequities caused by this judicially created doctrine, several state courts have abrogated or limited the immunity of state and local governments. See Note, Rethinking Sovereign Immunity after *Bivens*, 57 N. Y. U. L. Rev. 597, 603, and n. 26 (1982) (collecting cases).

differently from any other secured creditor.[13] Its interests are adequately protected by specific statutory provisions governing discharges and priorities. As the Commission on the Bankruptcy Laws of the United States observed, unanimously, in 1973:

> "The Commission also recommends that unpaid taxes entitled to priority be reduced from those accruing within three years prior to bankruptcy to those accruing within one year prior to bankruptcy and that the government be given no other priority for taxes in a bankruptcy proceeding (including those secured by a 'tax lien'). Data submitted to the Commission by the Treasury Department establishes that the total amount collected by the Federal Government as a result of all of its liens and priorities in bankruptcy proceedings is insignificant in the total federal budget. It is the view of the Commission that it is unseemly for the Federal Government to insist upon collecting its taxes at the expense of other creditors of the taxpayer, and that the

---

[13] In *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 209 (1983), the Court first held that "the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization." The Court then explained:

"We see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by § 542(a) to the same extent as any other secured creditor. The Bankruptcy Code expressly states that the term 'entity,' used in § 542(a), includes a governmental unit. § 101(14). See Tr. of Oral Arg. 16. Moreover, Congress carefully considered the effect of the new Bankruptcy Code on tax collection, see generally S. Rep. No. 95–1106 (1978) (Report of Senate Finance Committee), and decided to provide protection to tax collectors, such as the IRS, through grants of enhanced priorities for unsecured tax claims, § 507(a)(6), and by the nondischarge of tax liabilities, § 523(a)(1). S. Rep. No. 95–989, pp. 14–15 (1978). Tax collectors also enjoy the generally applicable right under § 363(e) to adequate protection for property subject to their liens. Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien." *Ibid.*

only possible justification for this would be a plea of necessity in order to keep the government functioning. As indicated above, such a plea would be totally without foundation in fact.

". . . When the Federal Government enters into business transactions, it should be prepared to deal upon a basis of equality with other creditors of the bankrupt business." Report of Commission on Bankruptcy Laws of the United States, H. R. Doc. No. 93–137, pt. 1, p. 22 (1973).

If these comments by the experts who played a major role in formulating the policies embodied in the Bankruptcy Code are sound—as I believe they are—one must ask what valid reason supports a construction of the waiver in § 106(c) that is so "strict" that the Court will not even examine its legislative history.

Surely the interest in requiring the Congress to draft its legislation with greater clarity or precision does not justify a refusal to make a good-faith effort to ascertain the actual meaning of the message it tried to convey in a statutory provision that is already on the books. The Court's stubborn insistence on "clear statements" burdens the Congress with unnecessary reenactment of provisions that were already plain enough when read literally.[14] The cost to litigants, to

---

[14] One scholar's comment on the countermajoritarian thrust of the Court's fascination with clear statement rules is illustrative:

"In *Dellmuth* v. *Muth*, [491 U. S. 223 (1989),] the Court held that the Education of the Handicapped Act (EHA) of 1975 did not abrogate state immunity. The Court reached this result even though the law imposed substantive obligations directly on the states, included the states in its jurisdictional grant, and included legislative discussion assuming that the states could be sued. After the Supreme Court changed the clear statement rule in 1985, Congress responded in 1986 with a broad textual abrogation of state immunity for statutes protecting the disabled. Yet in *Dellmuth*, the Court held not only that the EHA did not meet the more stringent test for abrogation, but that the 1986 statute made clear Congress' 'intent' not to abrogate state immunity in lawsuits filed before

the legislature, and to the public at large of this sort of judicial lawmaking is substantial and unfortunate. Its impact on individual citizens engaged in litigation against the sovereign is tragic.

The fact that Congress has ample power to correct the Court's unfortunate error does not justify this refusal to obey its command. I respectfully dissent.

1986. Congress overrode *Dellmuth* in 1990. That Congress had to pass the same statute three times to achieve its original goal is quite striking." Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L. J. 331, 409–410 (1991) (footnotes omitted).

Syllabus

HOLYWELL CORP. ET AL. *v.* SMITH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90–1361. Argued December 4, 1991—Decided February 25, 1992*

Petitioner debtors, four affiliated corporate entities and Theodore B. Gould, filed Chapter 11 bankruptcy petitions after one of the entities defaulted on a real estate loan. The Bankruptcy Court consolidated the cases and the debtors represented their own bankruptcy estates as debtors in possession. Creditors approved a Chapter 11 plan that provided, *inter alia*, for placement of the debtors' property into a trust and appointment of a trustee to liquidate all of the trust property and to distribute it to the creditors of the various bankruptcy estates. The plan said nothing about whether the trustee had to file income tax returns or pay any income tax due, but the United States did not object to the plan's confirmation. The plan took effect in October 1985. One of the corporate debtors filed a tax return for the fiscal year ending July 31, 1985, including as income capital gains earned in the postbankruptcy sale of certain properties in its estate, but requested respondent Smith, the appointed trustee, to pay the taxes owed. Neither the corporate debtors nor Smith filed income tax returns for succeeding fiscal years, in which there was capital gains and interest income. Over the objections of the United States and the debtors, the Bankruptcy Court granted Smith's request for a declaratory judgment that he had no duty under the Internal Revenue Code (Code) to file income tax returns or pay income taxes. Both the District Court and the Court of Appeals affirmed.

Held: Smith is required by the Code to file income tax returns and pay taxes on the income attributable to the property of both the corporate debtors and Gould. Pp. 52–59.

(a) Smith is an "assignee" of "all" or "substantially all" of the "property . . . of a corporation" and therefore is required by § 6012(b)(3) of the Code to file returns that the corporate debtors would have filed had their property not been assigned to him. The plan transferred the corporate debtors' estates to Smith as trustee, and it is undisputed that he meets the usual definition of the word "assignee" in both ordinary and legal usage. Nothing in § 6012(b)(3) limits the definition of an "as-

---

*Together with No. 90–1484, *United States* v. *Smith et al.*, also on certiorari to the same court.

signee" to persons who wind up a dissolving corporation or manage the day-to-day business of a distressed corporation. Pp. 52–54.

(b) With respect to the income attributable to Gould's property, Smith is required by § 6012(b)(4) to make a return not, as the United States argues, because he is the "fiduciary" of the "estate . . . of an individual," but because he is the "fiduciary" of a "trust." Since the plan declared and established a separate and distinct trust and vested the property of Gould's estate in Smith, it did not simply substitute Smith for Gould as the fiduciary of Gould's "estate." However, the trust here—which the plan described as a trust and created for the express purpose of liquidating Gould's estate and distributing it to creditors—clearly fits the description of a liquidating trust in 26 CFR § 301.7701–4(d). Moreover, when the plan assigned the property of Gould's estate to Smith, it gave him powers consistent with the definition of "fiduciary" in § 7701(a)(6) of the Code and 26 CFR § 301.7701–6. Respondents' argument that it is Gould who must pay the trust's taxes under the Code's "grantor trust" rules is rejected. *In re Sonner*, 53 B. R. 859, distinguished. Also rejected is their contention that Smith lacked sufficient discretion in performing his duties under the plan to be a fiduciary, since the liquidating trust is a trust under the Code and Smith's duties satisfy the regulations' description of a fiduciary. Pp. 54–58.

(c) Respondents also err in asserting that Smith may ignore the duties imposed by the Code because the plan does not require him to pay taxes. Section 1141(a) of the Bankruptcy Code—which states that "the provisions of a confirmed plan bind . . . any creditor"—does not preclude the United States from seeking payment of any taxes. Even if § 1141(a) binds creditors with respect to claims that arose before confirmation, it does not bind them with regard to postconfirmation claims. Cf. 11 U. S. C. § 101(10). Here, the United States is not seeking taxes due prior to Smith's appointment, but is merely asserting that Smith, after his appointment, must make tax returns in the same manner as the assignee of the property of any corporation or the trustee of any trust. Pp. 58–59.

911 F. 2d 1539, reversed.

THOMAS, J., delivered the opinion for a unanimous Court.

Kent L. Jones argued the cause for the United States in No. 90–1484 and petitioners in No. 90–1361. With him on the briefs for the United States were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Gary D. Gray,* and *Francis M. Allegra.*

Counsel

Dennis G. Lyons, *Stuart E. Seigel*, and *Kent A. Yalowitz* filed briefs for petitioners in No. 90–1361.

Herbert Stettin argued the cause for respondents in both cases. With him on the brief for respondent Smith were *Louis R. Cohen*, *F. David Lake, Jr.*, and *John Aramburu*. *Vance E. Salter*, *Thomas F. Noone*, *Edward P. Zujkowski*, *Mortimer M. Caplin*, *Walter B. Slocombe*, *Albert G. Lauber, Jr.*, *Julia L. Porter*, and *James E. Salles* filed a brief for respondent Bank of New York. *Barbara E. Vicevich* filed a brief for respondent Shutts & Bowen.†

---

†A brief of *amici curiae* was filed for the State of California et al. by *Mary Sue Terry*, Attorney General of Virginia, *H. Lane Kneedler*, Chief Deputy Attorney General, *K. Marshall Cook*, Deputy Attorney General, *Barbara M. Rose*, Senior Assistant Attorney General, and *Martha B. Brissette* and *John Patrick Griffin*, Assistant Attorneys General, *Daniel E. Lungren*, Attorney General of California, *Richard Blumenthal*, Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *John Payton*, Corporation Counsel of the District of Columbia, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Warren Price III*, Attorney General of Hawaii, *Roland W. Burris*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Bonnie J. Campbell*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *Michael E. Carpenter*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Michael C. Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Robert J. Del Tufo*, Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Charles W. Burson*, Attorney General of Tennessee, *Dan Morales*, Attorney General of Texas, *R. Paul Van Dam*, Attorney General of Utah, *Mario J. Palumbo*, Attorney General of West Virginia, and *Victor A. Kovner*, Corporation Counsel of the City of New York.

JUSTICE THOMAS delivered the opinion of the Court.

These cases require us to decide whether a trustee appointed to liquidate and distribute property as part of a Chapter 11 bankruptcy plan must file income tax returns and pay income tax under the Internal Revenue Code.

I

Miami Center Limited Partnership borrowed money from the Bank of New York (Bank) to develop "Miami Center," a hotel and office building complex in Miami, Florida. In August 1984, after it defaulted on the loan, MCLP and four affiliated debtors—Holywell Corporation, Chopin Associates, Miami Center Corporation, and Theodore B. Gould—each filed Chapter 11 bankruptcy petitions. The Bankruptcy Court consolidated the five cases.

Prior to confirmation of a Chapter 11 plan, the debtors represented their own bankruptcy estates as debtors in possession. See 11 U. S. C. § 1101(1). The estates of Gould and Holywell contained two principal assets: equity in Miami Center and cash proceeds from the postbankruptcy sale of certain real estate in Washington, D. C., known as the Washington Properties.

In August 1985, the Bank and other creditors approved a "Consolidated Plan of Reorganization." The plan required the debtors to give up their interests in Miami Center and the proceeds from the sale of the Washington Properties, but otherwise permitted them to remain in business. Part V of the plan provided:

> "1. A Trust is hereby declared and established on behalf of the Debtors . . . and an individual to be appointed by the Court . . . is designated as Trustee of all property of the estates of the Debtors . . . , including but not limited to, Miami Center [and] the Washington Proceeds . . . , to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the 'Miami Center Liquidating Trust.'

"2. . . . [A]ll right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors . . . ." App. 41.

The plan required the trustee to liquidate and distribute all of the trust property to the creditors of the various bankruptcy estates. It empowered the trustee to "[m]anage, operate, improve, and protect the Trust Property"; to "[r]elease, convey, or assign any right, title or interest in or about the Trust Property"; and to perform other, similar actions. *Id.*, at 42. The plan said nothing about whether the trustee had to file income tax returns or pay any income tax due. The United States did not object to its confirmation.

The plan took effect on October 10, 1985. The trustee appointed by the court, respondent Fred Stanton Smith, immediately sold Miami Center to the Bank in consideration for cash and cancellation of the Bank's claim. The trustee then distributed these and other assets to third-party creditors. Holywell Corporation filed a tax return for the fiscal year ending July 31, 1985. The income for this fiscal year included capital gains earned in the sale of the Washington Properties. Holywell asked the trustee to pay the taxes owed. Neither the corporate debtors nor the trustee filed federal income tax returns for any fiscal year ending after July 31, 1985. The income for these years included the capital gains earned in the sale of Miami Center and interest earned by reinvesting the proceeds.

In December 1987, the trustee sought a declaratory judgment from the Bankruptcy Court that he had no duty to file income tax returns or pay income tax under the federal income tax laws. The United States and the debtors opposed the action. The Bankruptcy Court declared that the trustee did not have to make any federal tax returns or pay any taxes. 85 B. R. 898 (SD Fla. 1988). The District Court, in an unreported opinion, and the Court of Appeals, 911 F. 2d 1539 (CA11 1990), both affirmed. The United States, in No.

90–1484, and the debtors, in No. 90–1361, each petitioned this Court for a writ of certiorari. We granted review. 500 U. S. 941 (1991).

II

The Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return. See 26 U. S. C. § 6151(a) ("[W]hen a return of a tax is required . . . the person required to make such return shall . . . pay such tax"). We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because § 6012(b)(3) requires him to make a return as the "assignee" of the "property . . . of a corporation." We further hold that the trustee must pay the tax due on the income attributable to the individual debtor's property because § 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust." Finally, we decide that the United States did not excuse the trustee from these duties by failing to object to the plan.

A

We first consider the trustee's duties with respect to the corporate debtors. Section 6012(b)(3) provides:

> "(3) Receivers, trustees and assignees for corporations
>
> "In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."

The parties disagree about whether the trustee in this case is a "receiver," a "trustee in a case under title 11 of

the United States Code [*i. e.*, the Bankruptcy Code]," or an "assignee." We hold that the trustee is an "assignee" of the corporate debtors under § 6012(b)(3). Because the parties do not argue that the trustee's duties would differ under another characterization, we decline to consider whether the trustee would qualify as a receiver or bankruptcy trustee.

The plan, as noted above, transferred the corporate debtors' estates to respondent Smith as trustee for the Miami Center Liquidating Trust. The respondents do not dispute that the trustee meets the usual definition of the word "assignee" in both ordinary and legal usage. See Webster's Third New International Dictionary 132 (1986) (defining an "assignee" as "one to whom a right or property is legally transferred"); Black's Law Dictionary 118–119 (6th ed. 1990) (defining an "assignee" as "[a] person to whom an assignment is made" and an "assignment" as "[t]he act of transferring to another all or part of one's property, interest, or rights"); cf. 26 CFR § 301.6036–1(a)(3) (1991) (defining an "assignee for the benefit of . . . creditors" as any person who takes possession of and liquidates property of a debtor for distribution to creditors). They argue, however, that courts have applied § 6012(b)(3) only in situations in which a person winds up the business of a dissolving corporation, see, *e. g.*, *First Nat. Bank of Greeley, Colo.* v. *United States*, 86 F. 2d 938, 942 (CA10 1936), or a person stands in the place of management in operating the day-to-day business of a distressed corporation, see, *e. g.*, *Louisville Property Co.* v. *Commissioner*, 140 F. 2d 547, 548 (CA6 1944). They conclude that § 6012(b)(3) cannot apply to the trustee in this case because he did neither. We find this argument unpersuasive.

Nothing in § 6012(b)(3) suggests that the word "assignee" is limited in the manner proposed by the respondents. The statute does not make dissolution necessary; it applies whether the corporation transfers "all" or "substantially all" of its property. It does not require the assignee to manage the corporation's business after the transfer of property; it

expressly requires the assignee to make a return "whether or not [the assigned] property or business is being operated." *Ibid.* We therefore conclude that § 6012(b)(3) applies to the trustee in this case. As the assignee of "all" or "substantially all" of the property of the corporate debtors, the trustee must file the returns that the corporate debtors would have filed had the plan not assigned their property to the trustee.

B

We next consider the trustee's duties with respect to the individual debtor, Theodore B. Gould. The parties agree that § 6012(b)(3) does not require the trustee to file a return as the "assignee" of Gould's estate because the section applies only to the assignee of the property of a corporation. Section § 6012(b)(4), however, provides:

> "(4) Returns of estates and trusts
>
> "Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof."

The United States argues that the trustee must file under § 6012(b)(4) as the fiduciary of Gould's Chapter 11 "estate." The debtors join the United States' argument and also contend in the alternative that the trustee must file under the section as the fiduciary of a "trust." The respondents insist that the trustee is not acting as the fiduciary of either a bankruptcy estate or a trust within the meaning of § 6012(b)(4). Accordingly, they assert, the section does not require the trustee to file a return on behalf of Gould. We agree with the debtors that the trustee must file a return because he is the fiduciary of a trust of an individual.

The parties agree that Gould originally served as the fiduciary of his own bankruptcy estate when he became debtor in possession. See 11 U. S. C. § 1107(a). At confirmation, according to the United States, the bankruptcy plan substituted the trustee for Gould but did not alter the bankruptcy

estate. In other words, the United States argues, the trustee took Gould's place as the fiduciary of "an estate of an individual under chapter . . . 11." The United States points out that the Bankruptcy Code explicitly provides that a fiduciary may hold and administer property of the estate after confirmation of the plan, see 11 U. S. C. § 1123(b)(3), and that nothing prohibits the substitution of a third-party trustee for the debtor in possession. The United States, therefore, maintains that the trustee must file a return under § 6012(b)(4).

Whether or not the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation, as the United States contends, we do not believe that a mere substitution occurred in this case. The plan, as quoted above, "declared and established" the new Miami Center Liquidating Trust. It then vested all of the assets of Gould's estate to respondent Smith as trustee. The plan did not simply substitute the trustee for Gould as the fiduciary of the estate. Rather, it created a separate and distinct trust holding the property of the estate and gave the trustee control of this property. The Bankruptcy Code expressly permits this arrangement. See § 1123(a)(5)(B) (authorizing a plan to transfer "all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan"). The trustee, therefore, is not acting as the fiduciary of Gould's bankruptcy estate.

The trustee, nonetheless, must make a return. Section 6012(b)(4), as the debtors assert, applies to the fiduciary of a trust as well as the fiduciary of a bankruptcy estate. We see no way for the respondents to deny that the Miami Center Liquidating Trust is a "trust" and that respondent Smith is its "fiduciary." A Treasury Regulation states:

> "Certain organizations which are commonly known as liquidating trusts are treated as trusts for purposes of the Internal Revenue Code. An organization will be considered a liquidating trust if it is organized for the

> primary purpose of liquidating and distributing the assets transferred to it, and if its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose." 26 CFR § 301.7701–4(d) (1991).

The Miami Center Liquidating Trust clearly fits this description. The plan not only describes the entity as a trust, but also created it for the express purpose of liquidating Gould's estate and distributing it to creditors.

Respondent Smith, moreover, acted as the fiduciary of this trust. The Internal Revenue Code defines "fiduciary" as a "guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." 26 U. S. C. § 7701(a)(6). A Treasury Regulation further specifies:

> "'Fiduciary' is a term which applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers." 26 CFR § 301.7701–6 (1991).

The bankruptcy plan, as noted above, assigned the property of Gould's estate to the trustee and gave him powers consistent with this definition. Smith therefore acted as the fiduciary of a trust within the meaning of § 6012(b)(4).

The respondents raise two principal objections to this conclusion. First, they argue that Gould must pay the Miami Center Liquidating Trust's income taxes under the so-called "grantor trust" rules in the Internal Revenue Code. See 26 U. S. C. §§ 671–677. They note, in particular, that Treasury Regulation § 1.677(a)–1(d) specifies that "a grantor is, in general, treated as the owner of a portion of a trust whose in-

come is . . . applied in discharge of a legal obligation of the grantor." 26 CFR § 1.667(a)–1(d) (1991). They assert that Gould is the grantor of the liquidating trust and that, under this regulation, he owns the trust's income and must pay taxes on it. To support this position, the respondents cite *In re Sonner*, 53 B. R. 859 (ED Va. 1985), which applied the grantor trust provisions to a postconfirmation liquidating trust.

While we express no opinion on the results in *Sonner*, the facts are distinguishable. In *Sonner*, the property of the bankruptcy estate by the terms of the plan appears to have revested in the debtor upon confirmation. The debtor pursuant to a plan then placed some of this property in a trust created to pay his creditors. Under these circumstances, the Bankruptcy Court concluded, the debtor had created a grantor trust under Treasury Regulation § 1.677(a)–1(d). See *Sonner*, *supra*, at 860, 864. In this case, however, the property of Gould's bankruptcy estate did not revest in Gould. The plan, instead, placed all of the estate's property directly in the Miami Center Liquidating Trust. Gould himself did not contribute anything to the trust, and we thus fail to see how the respondents can characterize him as the grantor.

Second, the respondents argue that the trustee did not act as a fiduciary because he had almost no discretion in performing his duties under the plan. They assert that the trustee merely acted as a "disbursing agent" who distributed liquidated funds to the creditors. As the dissenting judge noted below, labels and characterizations cannot alter the trustee's status for the purpose of the tax law. 911 F. 2d, at 1547. Because the liquidating trust is a trust under the Internal Revenue Code and because respondent Smith's duties under the plan satisfy the description of a fiduciary in

the regulations, the restrictions on the trustee's discretion do not remove him from coverage under § 6012(b)(4).*

C

The respondents finally assert that the trustee may ignore the duties imposed by §§ 6012 and 6151 because the Chapter 11 plan does not require him to pay taxes. They note that § 1141(a) of the Bankruptcy Code states that "the provisions of a confirmed plan bind . . . any creditor" whether or not the creditor has accepted the plan. They conclude that § 1141(a) precludes the United States, as a creditor, from seeking payment of any taxes. They add that the United States should have objected to the plan if it had wanted a different result. We disagree.

The United States is not seeking from the trustee any taxes that became due prior to his appointment. See Reply Brief for United States 13, n. 16. It simply asserts that the trustee, after his appointment, must make tax returns under § 6012(b) in the same manner as the assignee of the property of any corporation or the trustee of any trust. No tax liability becomes due under § 6151 until the time required for making those returns. See *Hartman* v. *Lauchli*, 238 F. 2d 881, 887 (CA8 1956); *Pan American Van Lines* v. *United States*, 607 F. 2d 1299, 1301 (CA9 1979). Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind the United States or any other creditor with respect to postconfirmation claims. Cf. 11 U. S. C. § 101(10)

*The respondents also argue that the trustee does not have to pay taxes because the petitioners conceded in the Bankruptcy Court that "the trust is not a separate taxable entity." 85 B. R. 898, 900 (SD Fla. 1988). This "concession" cannot help the respondents. The petitioners asserted that the trust was not a separate taxable entity when they argued that the plan did not create a new trust but instead simply substituted the trustee for Gould as the fiduciary of the bankruptcy estate. If the respondents accept this position, which we reject above, then they would have to agree that respondent Smith has to make a return as the fiduciary of an estate.

(1988 ed., Supp. II) (defining "creditor" as used in § 1141(a) as an entity with various kinds of preconfirmation claims). For these reasons, the judgment of the Court of Appeals is

Reversed.

Syllabus

FRANKLIN *v.* GWINNETT COUNTY PUBLIC SCHOOLS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90–918. Argued December 11, 1991—Decided February 26, 1992

Petitioner Franklin, a student in a high school operated by respondent school district, filed an action for damages in Federal District Court under Title IX of the Education Amendments of 1972, alleging, *inter alia*, that she had been subjected to continual sexual harassment and abuse by a teacher, Andrew Hill. After the complaint was filed, Hill resigned on the condition that all matters pending against him be dropped, and the school thereupon closed its investigation. The District Court subsequently dismissed the complaint on the ground that Title IX does not authorize an award of damages, and the Court of Appeals affirmed.

Held: A damages remedy is available for an action brought to enforce Title IX. Pp. 65–76.

(a) Title IX is enforceable through an implied right of action. *Cannon* v. *University of Chicago*, 441 U. S. 677. P. 65.

(b) The longstanding general rule is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. See, *e. g.*, *Bell* v. *Hood*, 327 U. S. 678, 684; *Davis* v. *Passman*, 442 U. S. 228, 246–247. Pp. 65–68.

(c) This Court's adherence to the general rule has not eroded since *Bell*. See, *e. g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433–435. In declaring that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a [constitutionally protected] right," *Davis*, 442 U. S., at 241, was not limiting the traditional presumption in favor of all appropriate relief to actions claiming constitutional violations. Rather it was merely attempting to decide whether a litigant had a "cause of action," a question that is analytically distinct from, and prior to, the one at issue: what relief, if any a litigant is entitled to receive, see *id.*, at 239. Nor did *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582, and *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, erode the traditional presumption. In fact, those cases support it, since a clear majority in *Guardians* expressed the view that damages were available in an action seeking remedies for an intentional violation of a statute

closely analogous to Title IX, while a unanimous Court in *Darrone* held that another such statute authorized the award of backpay. Pp. 68–71.

(d) Congress did not intend to limit the remedies available in a Title IX suit. Because the *Cannon* Court inferred a cause of action upon concluding that Title IX supported no express right of action, the silence of the pre-*Cannon* statutory text and legislative history on the issue of available remedies is neither surprising nor enlightening. Rather, the appropriate inquiry for the pre-*Cannon* period is the state of the law when Congress passed Title IX. Since, at that time, the traditional presumption in favor of all available remedies was firmly established, and this Court had recently found implied rights of action in six cases and approved a damages remedy in three of them, the lack of any legislative intent to abandon the traditional presumption is amply demonstrated. For the post-*Cannon* period, when Congress was legislating with full cognizance of that decision, analysis of the text and history of the two statutes enacted to amend Title IX—the Civil Rights Remedies Equalization Amendment of 1986 and the Civil Rights Restoration Act of 1987—establishes that Congress validated *Cannon*'s holding and made no effort to alter the traditional presumption. Pp. 71–73.

(e) The argument that a damages award would unduly expand the federal courts' power into a sphere properly reserved to the Executive and Legislative Branches in violation of separation of powers principles misconceives the difference between a cause of action and a remedy. Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power and, in fact, historically has been thought necessary to provide an important safeguard against legislative and executive abuses and to insure an independent Judiciary. Moreover, selective adjudication of the sort advocated here would harm separation of powers by giving judges the power to render inutile causes of action authorized by Congress through a decision that *no* remedy is available. Pp. 73–74.

(f) Also rejected is the contention that the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power. The Court's observation in *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 28–29, that remedies are limited under Spending Clause statutes when the alleged violation is *unintentional* is based on the theory that an entity receiving federal funds lacks notice that it will be liable for damages for such a violation, see *id.*, at 17. This notice problem does not arise in a case such as the present, where intentional discrimination is alleged and is proscribed by the statute in question. Moreover, the notion that Spending Clause statutes do not authorize monetary awards

for intentional violations is belied by the unanimous holding in *Darrone, supra*, at 628. Pp. 74–75.

(g) The assertion that Title IX remedies should nevertheless be limited to backpay and prospective relief diverges from this Court's traditional approach to deciding what remedies are available for violation of a federal right. Both suggested remedies are equitable in nature, and it is axiomatic that a court should determine the adequacy of damages at law before resorting to equitable relief. Moreover, both suggested remedies are clearly inadequate in that they would provide Franklin no relief: backpay because she was a student when the alleged discrimination occurred, and prospective relief because she no longer attends school in respondent system and Hill no longer teaches there. Pp. 75–76.

911 F. 2d 617, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 76.

Joel I. Klein argued the cause for petitioner. With him on the briefs were *Richard G. Taranto* and *Michael Weinstock*.

Albert M. Pearson III argued the cause for respondents. With him on the brief were *Frank C. Bedinger III* and *E. Victoria Sweeny*.

Stephen L. Nightingale argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts*, and *John P. Schnitker*.*

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the implied right of action under Title IX of the Education Amendments of

---

*Briefs of *amici curiae* urging reversal were filed for the National Women's Law Center et al. by *Marcia D. Greenberger*; and for the Lawyers' Committee for Civil Rights Under Law by *William T. Lake, William H. Brown III, Herbert M. Wachtell, Norman Redlich*, and *Thomas J. Henderson*.

Peter J. Kadzik and *Arlene B. Mayerson* filed a brief for the American Council of the Blind et al. as *amici curiae*.

1972, 20 U. S. C. §§ 1681–1688 (Title IX),[1] which this Court recognized in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), supports a claim for monetary damages.

I

Petitioner Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia, between September 1985 and August 1989. Respondent Gwinnett County School District operates the high school and receives federal funds. According to the complaint filed on December 29, 1988, in the United States District Court for the Northern District of Georgia, Franklin was subjected to continual sexual harassment beginning in the autumn of her tenth grade year (1986) from Andrew Hill, a sports coach and teacher employed by the district. Among other allegations, Franklin avers that Hill engaged her in sexually oriented conversations in which he asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man, Complaint ¶ 10; First Amended Complaint, Exh. A, p. 3;[2] that Hill forcibly kissed her on the mouth in the school parking lot, Complaint ¶ 17; that he telephoned her at her home and asked if she would meet him socially, Complaint ¶ 21; First Amended Complaint, Exh. A, pp. 4–5; and that, on three occasions in her junior year, Hill interrupted a class, requested that the teacher excuse Franklin, and took her to a private office where he subjected her to coercive intercourse, Complaint ¶¶ 25, 27, 32. The complaint further alleges that though

---

[1] This statute provides in pertinent part that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a).

[2] This exhibit is the report of the United States Department of Education's Office for Civil Rights based on that office's investigation of this case. Franklin incorporated this exhibit into her amended complaint.

they became aware of and investigated Hill's sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it and discouraged Franklin from pressing charges against Hill. Complaint ¶¶ 23, 24, 35. On April 14, 1988, Hill resigned on the condition that all matters pending against him be dropped. Complaint ¶¶ 36, 37. The school thereupon closed its investigation. Complaint ¶ 37.

In this action,[3] the District Court dismissed the complaint on the ground that Title IX does not authorize an award of damages. The Court of Appeals affirmed. 911 F. 2d 617 (CA11 1990). The court noted that analysis of Title IX and Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* (Title VI), has developed along similar lines. Citing as binding precedent *Drayden* v. *Needville Independent School Dist.*, 642 F. 2d 129 (CA5 1981), a decision rendered prior to the division of the Fifth Circuit, the court concluded that Title VI did not support a claim for monetary damages. The court then analyzed this Court's decision in *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582 (1983), to determine whether it implicitly overruled *Drayden*. The court stated that the absence of a majority opinion left unresolved the question whether a court could award such relief upon a showing of intentional discrimination. As a second basis for its holding that monetary damages were unavailable, the court reasoned that Title IX was enacted under Congress' Spending Clause powers and that

[3] Prior to bringing this lawsuit, Franklin filed a complaint with the Office for Civil Rights of the United States Department of Education (OCR) in August 1988. After investigating these charges for several months, OCR concluded that the school district had violated Franklin's rights by subjecting her to physical and verbal sexual harassment and by interfering with her right to complain about conduct proscribed by Title IX. OCR determined, however, that because of the resignations of Hill and respondent William Prescott and the implementation of a school grievance procedure, the district had come into compliance with Title IX. It then terminated its investigation. First Amended Complaint, Exh. A, pp. 7–9.

"[u]nder such statutes, relief may frequently be limited to that which is equitable in nature, with the recipient of federal funds thus retaining the option of terminating such receipt in order to rid itself of an injunction." 911 F. 2d, at 621.[4] The court closed by observing it would "proceed with extreme care" to afford compensatory relief absent express provision by Congress or clear direction from this Court. *Id.*, at 622. Accordingly, it held that an action for monetary damages could not be sustained for an alleged intentional violation of Title IX, and affirmed the District Court's ruling to that effect. *Ibid.*[5]

Because this opinion conflicts with a decision of the Court of Appeals for the Third Circuit, see *Pfeiffer* v. *Marion Center Area School Dist.*, 917 F. 2d 779, 787–789 (1990), we granted certiorari, 501 U. S. 1204 (1991). We reverse.

II

In *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), the Court held that Title IX is enforceable through an implied right of action. We have no occasion here to reconsider that decision. Rather, in this case we must decide what remedies are available in a suit brought pursuant to this implied right. As we have often stated, the question of what remedies are available under a statute that provides a private right of action is "analytically distinct" from the issue

---

[4] The court also rejected an argument by Franklin that the terms of outright prohibition of Title VII, 42 U. S. C. §§ 2000e to 2000e–17, apply by analogy to Title IX's antidiscrimination provision, and that the remedies available under the two statutes should also be the same. 911 F. 2d, at 622. Because Franklin does not pursue this contention here, we need not address whether it has merit.

[5] Judge Johnson concurred specially, writing that the result was controlled by *Drayden* v. *Needville Independent School Dist.*, 642 F. 2d 129 (CA5 1981), and that there was no need to address whether Titles VI and IX are grounded solely in the Spending Clause and whether Title VII analysis should apply to an action under Titles VI or IX. See 911 F. 2d, at 622–623.

of whether such a right exists in the first place. *Davis* v. *Passman*, 442 U. S. 228, 239 (1979). Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575–576 (1979), we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. *Davis*, *supra*, at 246–247. This principle has deep roots in our jurisprudence.

A

"[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). The Court explained this longstanding rule as jurisdictional and upheld the exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the Constitution or laws of the United States. *Ibid.*

The *Bell* Court's reliance on this rule was hardly revolutionary. From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right. In *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), for example, Chief Justice Marshall observed that our Government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." This principle originated in the English common law, and Blackstone described it as "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 W. Blackstone, Commentaries 23 (1783). See also *Ashby* v. *White*, 1 Salk. 19, 21, 87 Eng.

Rep. 808, 816 (Q. B. 1702) ("If a statute gives a right, the common law will give a remedy to maintain that right . . .").

In *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524 (1838), the Court applied these principles to an Act of Congress that accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but which did not specify the precise remedy available to the carriers. After surveying possible remedies, which included an action against the Postmaster General for monetary damages, the Court held that the carriers were entitled to a writ of mandamus compelling payment under the terms of the statute. "It cannot be denied but that congress had the power to command that act to be done," the Court stated; "and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist. And if the remedy cannot be applied by the circuit court of this district, it exists nowhere." *Id.*, at 624. *Dooley* v. *United States*, 182 U. S. 222, 229 (1901), also restated "the principle that a liability created by statute without a remedy may be enforced by a common-law action."

The Court relied upon this traditional presumption again after passage of the Federal Safety Appliance Act of 1893, ch. 196, 27 Stat. 531. In *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33 (1916), the Court first had to determine whether the Act supported an implied right of action. After answering that question in the affirmative, the Court then upheld a claim for monetary damages: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . . ." *Id.*, at 39. The foundation upon which the *Bell* v. *Hood* Court articulated this traditional presump-

tion, therefore, was well settled. See also *Texas & New Orleans R. Co.* v. *Railway Clerks*, 281 U. S. 548, 569 (1930).

B

Respondents and the United States as *amicus curiae*, however, maintain that whatever the traditional presumption may have been when the Court decided *Bell* v. *Hood*, it has disappeared in succeeding decades. We do not agree. In *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), the Court adhered to the general rule that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies. Relying on *Bell* v. *Hood*, the *Borak* Court specifically rejected an argument that a court's remedial power to redress violations of the Securities Exchange Act of 1934 was limited to a declaratory judgment. 377 U. S., at 433–434. The Court concluded that the federal courts "have the power to grant all necessary remedial relief" for violations of the Act. *Id.*, at 435. As Justice Clark's opinion for the Court observed, this holding closely followed the reasoning of a similar case brought under the Securities Act of 1933, in which the Court had stated:

> "'The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.'" *Id.*, at 433–434 (quoting *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 288 (1940)).

That a statute does not authorize the remedy at issue "in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment." *Id.*, at 288. Subsequent cases have been true to this posi-

tion. See, *e. g.*, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969), stating that the "existence of a statutory right implies the existence of all necessary and appropriate remedies"; *Carey* v. *Piphus*, 435 U. S. 247, 255 (1978), upholding damages remedy under Rev. Stat. § 1979, 42 U. S. C. § 1983, even though the enacting Congress had not specifically provided such relief.

The United States contends that the traditional presumption in favor of all appropriate relief was abandoned by the Court in *Davis* v. *Passman*, 442 U. S. 228 (1979), and that the *Bell* v. *Hood* rule was limited to actions claiming constitutional violations. The United States quotes language in *Davis* to the effect that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis*, 442 U. S., at 241. The Government's position, however, mirrors the very misunderstanding over the difference between a cause of action and the relief afforded under it that sparked the confusion we attempted to clarify in *Davis*. Whether Congress may limit the class of persons who have a right of action under Title IX is irrelevant to the issue in this lawsuit. To reiterate, "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Id.*, at 239. *Davis*, therefore, did nothing to interrupt the long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief. See *id.*, at 247, n. 26 (contrasting *Brown* v. *GSA*, 425 U. S. 820 (1976)).[6]

---

[6] Cases cited by respondents and the United States since *Davis* are inapposite, either because they involved holdings that plaintiffs had no right of action, see, *e. g.*, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083 (1991); *Karahalios* v. *Federal Employees*, 489 U. S. 527 (1989); *Thompson*

Contrary to arguments by respondents and the United States that *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582 (1983), and *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624 (1984), eroded this traditional presumption, those cases in fact support it. Though the multiple opinions in *Guardians* suggest the difficulty of inferring the common ground among the Justices in that case, a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action. See *Guardians*, 463 U. S., at 595 (WHITE, J., joined by REHNQUIST, J.); *id.*, at 607–611 (Powell, J., concurring in judgment, joined by Burger, C. J.); *id.*, at 612, and n. 1 (O'CONNOR, J., concurring in judgment); *id.*, at 624–628 (Marshall, J., dissenting); *id.*, at 636 (STEVENS, J., dissenting, joined by Brennan and BLACKMUN, JJ.). The correctness of this inference was made clear the following Term when the Court unanimously held that the 1978 amendment to § 504 of the Rehabilitation Act of 1973—which had expressly incorporated the "remedies, procedures, and rights set forth in title VI" (29 U. S. C. § 794a(a)(2))—authorizes an award of backpay. In *Darrone*, the Court observed that a majority in *Guardians* had "agreed that retroactive relief is available to private plaintiffs for all discrimination . . . that is actionable under Title VI." 465 U. S., at 630, n. 9. The general rule, therefore, is that absent clear direction to the contrary by

---

v. *Thompson*, 484 U. S. 174 (1988); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77 (1981); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979); *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975); or because the Court rejected a claim for damages under a statute that expressly enumerated the remedies available to plaintiffs, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134 (1985).

Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

III

We now address whether Congress intended to limit application of this general principle in the enforcement of Title IX. See *Bush* v. *Lucas*, 462 U. S. 367, 378 (1983); *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 200 (1967). Because the cause of action was inferred by the Court in *Cannon*, the usual recourse to statutory text and legislative history in the period prior to that decision necessarily will not enlighten our analysis. Respondents and the United States fundamentally misunderstand the nature of the inquiry, therefore, by needlessly dedicating large portions of their briefs to discussions of how the text and legislative intent behind Title IX are "silent" on the issue of available remedies. Since the Court in *Cannon* concluded that this statute supported no express right of action, it is hardly surprising that Congress also said nothing about the applicable remedies for an implied right of action.

During the period prior to the decision in *Cannon*, the inquiry in any event is *not* "'basically a matter of statutory construction,'" as the United States asserts. Brief for United States as *Amicus Curiae* 8 (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15 (1979)). Rather, in determining Congress' intent to limit application of the traditional presumption in favor of all appropriate relief, we evaluate the state of the law when the Legislature passed Title IX. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378 (1982). In the years before and after Congress enacted this statute, the Court "follow[ed] a common-law tradition [and] regarded the denial of a remedy as the exception rather than the rule." *Id.*, at 375 (footnote omitted). As we outlined in Part II, this has been the prevailing presumption in our federal

courts since at least the early 19th century. In *Cannon*, the majority upheld an implied right of action in part because in the decade immediately preceding enactment of Title IX in 1972, this Court had found implied rights of action in six cases.[7] In three of those cases, the Court had approved a damages remedy. See, *e. g.*, *J. I. Case Co.*, 377 U. S., at 433; *Wyandotte Transportation Co.*, *supra*, at 207; *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969). Wholly apart from the wisdom of the *Cannon* holding, therefore, the same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies.

In the years *after* the announcement of *Cannon*, on the other hand, a more traditional method of statutory analysis is possible, because Congress was legislating with full cognizance of that decision. Our reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX. In the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U. S. C. § 2000d–7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. This statute cannot be read except as a validation of *Cannon*'s holding. A subsection of the 1986 law provides that in a suit against a State, "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a

---

[7] *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191 (1967); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969); and *Superintendent of Ins. of New York* v. *Bankers Life & Casualty Co.*, 404 U. S. 6 (1971).

State." 42 U. S. C. §2000d–7(a)(2). While it is true that this saving clause says nothing about the nature of those other available remedies, cf. *Milwaukee* v. *Illinois*, 451 U. S. 304, 329, n. 22 (1981), absent any contrary indication in the text or history of the statute, we presume Congress enacted this statute with the prevailing traditional rule in mind.

In addition to the Rehabilitation Act Amendments of 1986, Congress also enacted the Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 28. Without in any way altering the existing rights of action and the corresponding remedies permissible under Title IX, Title VI, §504 of the Rehabilitation Act, and the Age Discrimination Act, Congress broadened the coverage of these antidiscrimination provisions in this legislation. In seeking to correct what it considered to be an unacceptable decision on our part in *Grove City College* v. *Bell*, 465 U. S. 555 (1984), Congress made no effort to restrict the right of action recognized in *Cannon* and ratified in the 1986 Act or to alter the traditional presumption in favor of any appropriate relief for violation of a federal right. We cannot say, therefore, that Congress has limited the remedies available to a complainant in a suit brought under Title IX.

IV

Respondents and the United States nevertheless suggest three reasons why we should not apply the traditional presumption in favor of appropriate relief in this case.

A

First, respondents argue that an award of damages violates separation of powers principles because it unduly expands the federal courts' power into a sphere properly reserved to the Executive and Legislative Branches. Brief for Respondents 22–25. In making this argument, respondents misconceive the difference between a cause of action and a remedy. Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discre-

tion to award appropriate relief involves no such increase in judicial power. See generally Note, Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy, 48 Colum. L. Rev. 1090, 1094–1095 (1948). Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action. Indeed, properly understood, respondents' position invites us to *abdicate* our historic judicial authority to award appropriate relief in cases brought in our court system. It is well to recall that such authority historically has been thought necessary to provide an important safeguard against abuses of legislative and executive power, see *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524 (1838), as well as to ensure an independent Judiciary. See generally Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell v. Hood*, 117 U. Pa. L. Rev. 1, 16–17 (1968). Moreover, selective abdication of the sort advocated here would harm separation of powers principles in another way, by giving judges the power to render inutile causes of action authorized by Congress through a decision that *no* remedy is available.

B

Next, consistent with the Court of Appeals' reasoning, respondents and the United States contend that the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power. In *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 28–29 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. See *id.*, at 17. This notice problem does

not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by our unanimous holding in *Darrone*. See 465 U. S., at 628. Respondents and the United States characterize the backpay remedy in *Darrone* as equitable relief, but this description is irrelevant to their underlying objection: that application of the traditional rule in this case will require state entities to pay monetary awards out of their treasuries for intentional violations of federal statutes.[8]

C

Finally, the United States asserts that the remedies permissible under Title IX should nevertheless be limited to backpay and prospective relief. In addition to diverging from our traditional approach to deciding what remedies are available for violation of a federal right, this position conflicts with sound logic. First, both remedies are equitable in nature, and it is axiomatic that a court should determine

[8] Franklin argues that, in any event, Title IX should not be viewed solely as having been enacted under Congress' Spending Clause powers and that it also rests on powers derived from §5 of the Fourteenth Amendment. See Brief for Petitioner 19, n. 10. Because we conclude that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute, we need not decide which power Congress utilized in enacting Title IX.

the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate. *Whitehead* v. *Shattuck*, 138 U. S. 146, 150 (1891). See generally C. McCormick, Damages 1 (1935). Moreover, in this case the equitable remedies suggested by respondent and the Federal Government are clearly inadequate. Backpay does nothing for petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill—the person she claims subjected her to sexual harassment—no longer teaches at the school and she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all. The Government's answer that administrative action helps other similarly situated students in effect acknowledges that its approach would leave petitioner remediless.

V

In sum, we conclude that a damages remedy is available for an action brought to enforce Title IX. The judgment of the Court of Appeals, therefore, is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

The substantive right at issue here is one that Congress did not expressly create, but that this Court found to be "implied." See *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979). Quite obviously, the search for what was Congress' *remedial* intent as to a right whose very existence Congress did not expressly acknowledge is unlikely to succeed, see *ante*, at 71; it is "hardly surprising," as the Court says, *ibid.*, that the usual sources yield no explicit answer.

The Court finds an implicit answer, however, in the legislators' presumptive awareness of our practice of using "any available remedy" to redress violations of legal rights. *Bell* v. *Hood*, 327 U. S. 678, 684 (1946); see *ante*, at 72–73. This strikes me as question begging. We can plausibly assume acquiescence in our *Bell* v. *Hood* presumption when the Legislature says nothing about remedy in expressly creating a private right of action; perhaps even when it says nothing about remedy in creating a private right of action by clear textual implication; but not, I think, when it says nothing about remedy in a statute in which the courts divine a private right of action on the basis of "contextual" evidence such as that in *Cannon*, which charged Congress with knowledge of a court of appeals' creation of a cause of action under a similarly worded statute. See *Cannon*, *supra*, at 696–698. Whatever one thinks of the validity of the last approach, it surely rests on attributed rather than actual congressional knowledge. It does not demonstrate an explicit legislative decision to create a cause of action, and so could not be expected to be accompanied by a legislative decision to alter the application of *Bell* v. *Hood*. Given the nature of *Cannon* and some of our earlier "implied right of action" cases, what the Court's analytical construct comes down to is this: Unless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know it is creating, it intends the full gamut of remedies to be applied.

In my view, when rights of action are judicially "implied," categorical limitations upon their remedial scope may be judicially implied as well. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84–85 (1975). Although we have abandoned the expansive rights-creating approach exemplified by *Cannon*, see *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575–576 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 18, 23–24 (1979)—and perhaps ought to abandon the notion of implied causes of action entirely, see *Thompson* v. *Thompson*, 484 U. S. 174, 191 (1988) (SCALIA, J., concurring

in judgment)—causes of action that came into existence under the *ancien regime* should be limited by the same logic that gave them birth. To require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be express, is to provide, in effect, that the most questionable of private rights will also be the most expansively remediable. As the United States puts it, "[w]hatever the merits of 'implying' rights of action may be, there is no justification for treating [congressional] silence as the equivalent of the broadest imaginable grant of remedial authority." Brief for United States as *Amicus Curiae* 12–13.

I nonetheless agree with the Court's disposition of this case. Because of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate. The Rehabilitation Act Amendments of 1986, 42 U. S. C. § 2000d–7(a)(2), must be read, in my view, not only "as a validation of *Cannon*'s holding," *ante*, at 72, but also as an implicit acknowledgment that damages are available. See 42 U. S. C. § 2000d–7(a)(1) (withdrawing the States' Eleventh Amendment immunity); § 2000d–7(a)(2) (providing that, in suits against States, "remedies (including remedies both at law and in equity) are available for [violations of Title IX] to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State"). I therefore concur in the judgment.

Syllabus

INDOPCO, INC. *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90–1278. Argued November 12, 1991—Decided February 26, 1992

On its 1978 federal income tax return, petitioner corporation claimed a deduction for certain investment banking fees and expenses that it incurred during a friendly acquisition in which it was transformed from a publicly held, freestanding corporation into a wholly owned subsidiary. After respondent Commissioner disallowed the claim, petitioner sought reconsideration in the Tax Court, adding to its claim deductions for legal fees and other acquisition-related expenses. The Tax Court ruled that because long-term benefits accrued to petitioner from the acquisition, the expenditures were capital in nature and not deductible under § 162(a) of the Internal Revenue Code as "ordinary and necessary" business expenses. The Court of Appeals affirmed, rejecting petitioner's argument that, because the expenses did not "create or enhance . . . a separate and distinct additional asset," see *Commissioner* v. *Lincoln Savings & Loan Assn.*, 403 U. S. 345, 354, they could not be capitalized under § 263 of the Code.

Held: Petitioner's expenses do not qualify for deduction under § 162(a). Deductions are exceptions to the norm of capitalization and are allowed only if there is clear provision for them in the Code and the taxpayer has met the burden of showing a right to the deduction. *Commissioner* v. *Lincoln Savings & Loan Assn.*, *supra*, holds simply that the creation of a separate and distinct asset may be a sufficient condition for classification as a capital expenditure, not that it is a prerequisite to such classification. Nor does *Lincoln Savings* prohibit reliance on future benefit as means of distinguishing an ordinary business expense from a capital expenditure. Although the presence of an incidental future benefit may not warrant capitalization, a taxpayer's realization of benefits beyond the year in which the expenditure is incurred is important in determining whether the appropriate tax treatment is immediate deduction or capitalization. The record in the instant case amply supports the lower courts' findings that the transaction produced significant benefits to petitioner extending beyond the tax year in question. Pp. 83–90.

918 F. 2d 426, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Richard J. Hiegel argued the cause for petitioner. With him on the briefs were *Geoffrey R. S. Brown, Rory O. Millson,* and *Richard H. Walker.*

Kent L. Jones argued the cause for respondent. With him on the brief were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Gilbert S. Rothenberg,* and *Bruce R. Ellisen.**

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we must decide whether certain professional expenses incurred by a target corporation in the course of a friendly takeover are deductible by that corporation as "ordinary and necessary" business expenses under § 162(a) of the Internal Revenue Code.

I

Most of the relevant facts are stipulated. See App. 12, 149. Petitioner INDOPCO, Inc., formerly named National Starch and Chemical Corporation and hereinafter referred to as National Starch, is a Delaware corporation that manufactures and sells adhesives, starches, and specialty chemical products. In October 1977, representatives of Unilever United States, Inc., also a Delaware corporation (Unilever),[1] expressed interest in acquiring National Starch, which was one of its suppliers, through a friendly transaction. National Starch at the time had outstanding over 6,563,000 common shares held by approximately 3,700 shareholders. The stock was listed on the New York Stock Exchange. Frank and Anna Greenwall were the corporation's largest shareholders and owned approximately 14.5% of the common. The Greenwalls, getting along in years and concerned about

---

**Timothy J. McCormally* and *Mary L. Fahey* filed a brief for the Tax Executives Institute, Inc., as *amicus curiae* urging reversal.

[1] Unilever is a holding company. Its then principal subsidiaries were Lever Brothers Co. and Thomas J. Lipton, Inc.

their estate plans, indicated that they would transfer their shares to Unilever only if a transaction tax free for them could be arranged.

Lawyers representing both sides devised a "reverse subsidiary cash merger" that they felt would satisfy the Greenwalls' concerns. Two new entities would be created—National Starch and Chemical Holding Corp. (Holding), a subsidiary of Unilever, and NSC Merger, Inc., a subsidiary of Holding that would have only a transitory existence. In an exchange specifically designed to be tax free under § 351 of the Internal Revenue Code, 26 U. S. C. § 351, Holding would exchange one share of its nonvoting preferred stock for each share of National Starch common that it received from National Starch shareholders. Any National Starch common that was not so exchanged would be converted into cash in a merger of NSC Merger, Inc., into National Starch.

In November 1977, National Starch's directors were formally advised of Unilever's interest and the proposed transaction. At that time, Debevoise, Plimpton, Lyons & Gates, National Starch's counsel, told the directors that under Delaware law they had a fiduciary duty to ensure that the proposed transaction would be fair to the shareholders. National Starch thereupon engaged the investment banking firm of Morgan Stanley & Co., Inc., to evaluate its shares, to render a fairness opinion, and generally to assist in the event of the emergence of a hostile tender offer.

Although Unilever originally had suggested a price between $65 and $70 per share, negotiations resulted in a final offer of $73.50 per share, a figure Morgan Stanley found to be fair. Following approval by National Starch's board and the issuance of a favorable private ruling from the Internal Revenue Service that the transaction would be tax free under § 351 for those National Starch shareholders who ex-

changed their stock for Holding preferred, the transaction was consummated in August 1978.[2]

Morgan Stanley charged National Starch a fee of $2,200,000, along with $7,586 for out-of-pocket expenses and $18,000 for legal fees. The Debevoise firm charged National Starch $490,000, along with $15,069 for out-of-pocket expenses. National Starch also incurred expenses aggregating $150,962 for miscellaneous items—such as accounting, printing, proxy solicitation, and Securities and Exchange Commission fees—in connection with the transaction. No issue is raised as to the propriety or reasonableness of these charges.

On its federal income tax return for its short taxable year ended August 15, 1978, National Starch claimed a deduction for the $2,225,586 paid to Morgan Stanley, but did not deduct the $505,069 paid to Debevoise or the other expenses. Upon audit, the Commissioner of Internal Revenue disallowed the claimed deduction and issued a notice of deficiency. Petitioner sought redetermination in the United States Tax Court, asserting, however, not only the right to deduct the investment banking fees and expenses but, as well, the legal and miscellaneous expenses incurred.

The Tax Court, in an unreviewed decision, ruled that the expenditures were capital in nature and therefore not deductible under § 162(a) in the 1978 return as "ordinary and necessary expenses." *National Starch and Chemical Corp.* v. *Commissioner*, 93 T. C. 67 (1989). The court based its holding primarily on the long-term benefits that accrued to National Starch from the Unilever acquisition. *Id.*, at 75. The United States Court of Appeals for the Third Circuit affirmed, upholding the Tax Court's findings that "both Unilever's enormous resources and the possibility of synergy arising from the transaction served the long-term better-

[2] Approximately 21% of National Starch common was exchanged for Holding preferred. The remaining 79% was exchanged for cash. App. 14.

ment of National Starch." *National Starch & Chemical Corp.* v. *Commissioner*, 918 F. 2d 426, 432–433 (1990). In so doing, the Court of Appeals rejected National Starch's contention that, because the disputed expenses did not "create or enhance . . . a separate and distinct additional asset," see *Commissioner* v. *Lincoln Savings & Loan Assn.*, 403 U. S. 345, 354 (1971), they could not be capitalized and therefore were deductible under § 162(a). 918 F. 2d, at 428–431. We granted certiorari to resolve a perceived conflict on the issue among the Courts of Appeals.[3] 500 U. S. 914 (1991).

II

Section 162(a) of the Internal Revenue Code allows the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." 26 U. S. C. § 162(a). In contrast, § 263 of the Code allows no deduction for a capital expenditure—an "amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." § 263(a)(1). The primary effect of characterizing a payment as either a business expense or a capital expenditure concerns the timing of the taxpayer's cost recovery: While business expenses are currently deductible, a capital expenditure usually is amortized and depreci-

[3] Compare the Third Circuit's opinion, 918 F. 2d, at 430, with *NCNB Corp.* v. *United States*, 684 F. 2d 285, 293–294 (CA4 1982) (bank expenditures for expansion-related planning reports, feasibility studies, and regulatory applications did not "create or enhance separate and identifiable assets," and therefore were ordinary and necessary expenses under § 162(a)), and *Briarcliff Candy Corp.* v. *Commissioner*, 475 F. 2d 775, 782 (CA2 1973) (suggesting that *Lincoln Savings* "brought about a radical shift in emphasis," making capitalization dependent on whether the expenditure creates or enhances a separate and distinct additional asset). See also *Central Texas Savings & Loan Assn.* v. *United States*, 731 F. 2d 1181, 1184 (CA5 1984) (inquiring whether establishment of new branches "creates a separate and distinct additional asset" so that capitalization is the proper tax treatment).

ated over the life of the relevant asset, or, where no specific asset or useful life can be ascertained, is deducted upon dissolution of the enterprise. See 26 U. S. C. §§ 167(a) and 336(a); Treas. Reg. § 1.167(a), 26 CFR § 1.167(a) (1991). Through provisions such as these, the Code endeavors to match expenses with the revenues of the taxable period to which they are properly attributable, thereby resulting in a more accurate calculation of net income for tax purposes. See, *e. g.*, *Commissioner* v. *Idaho Power Co.*, 418 U. S. 1, 16 (1974); *Ellis Banking Corp.* v. *Commissioner*, 688 F. 2d 1376, 1379 (CA11 1982), cert. denied, 463 U. S. 1207 (1983).

In exploring the relationship between deductions and capital expenditures, this Court has noted the "familiar rule" that "an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer." *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590, 593 (1943); *Deputy* v. *Du Pont*, 308 U. S. 488, 493 (1940); *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440 (1934). The notion that deductions are exceptions to the norm of capitalization finds support in various aspects of the Code. Deductions are specifically enumerated and thus are subject to disallowance in favor of capitalization. See §§ 161 and 261. Nondeductible capital expenditures, by contrast, are not exhaustively enumerated in the Code; rather than providing a "complete list of nondeductible expenditures," *Lincoln Savings*, 403 U. S., at 358, § 263 serves as a general means of distinguishing capital expenditures from current expenses. See *Commissioner* v. *Idaho Power Co.*, 418 U. S., at 16. For these reasons, deductions are strictly construed and allowed only "as there is a clear provision therefor." *New Colonial Ice Co.* v. *Helvering*, 292 U. S., at 440; *Deputy* v. *Du Pont*, 308 U. S., at 493.[4]

[4] See also Johnson, The Expenditures Incurred by the Target Corporation in an Acquisitive Reorganization are Dividends to the Shareholders, 53 Tax Notes 463, 478 (1991) (noting the importance of a "strong law of capitalization" to the tax system).

The Court also has examined the interrelationship between the Code's business expense and capital expenditure provisions.[5] In so doing, it has had occasion to parse § 162(a) and explore certain of its requirements. For example, in *Lincoln Savings*, we determined that, to qualify for deduction under § 162(a), "an item must (1) be 'paid or incurred during the taxable year,' (2) be for 'carrying on any trade or business,' (3) be an 'expense,' (4) be a 'necessary' expense, and (5) be an 'ordinary' expense." 403 U. S., at 352. See also *Commissioner* v. *Tellier*, 383 U. S. 687, 689 (1966) (the term "necessary" imposes "only the minimal requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business,'" quoting *Welch* v. *Helvering*, 290 U. S. 111, 113 (1933)); *Deputy* v. *Du Pont*, 308 U. S., at 495 (to qualify as "ordinary," the expense must relate to a transaction "of common or frequent occurrence in

[5] See, *e. g.*, *Commissioner* v. *Idaho Power Co.*, 418 U. S. 1 (1974) (equipment depreciation allocable to construction of capital facilities is to be capitalized); *United States* v. *Mississippi Chemical Corp.*, 405 U. S. 298 (1972) (cooperatives' required purchases of stock in Bank for Cooperatives are not currently deductible); *Commissioner* v. *Lincoln Savings & Loan Assn.*, 403 U. S. 345 (1971) (additional premiums paid by bank to federal insurers are capital expenditures); *Woodward* v. *Commissioner*, 397 U. S. 572 (1970) (legal, accounting, and appraisal expenses incurred in purchasing minority stock interest are capital expenditures); *United States* v. *Hilton Hotels Corp.*, 397 U. S. 580 (1970) (consulting, legal, and other professional fees incurred by acquiring firm in minority stock appraisal proceeding are capital expenditures); *Commissioner* v. *Tellier*, 383 U. S. 687 (1966) (legal expenses incurred in defending against securities fraud charges are deductible under § 162(a)); *Commissioner* v. *Heininger*, 320 U. S. 467 (1943) (legal expenses incurred in disputing adverse postal designation are deductible as ordinary and necessary expenses); *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590 (1943) (payment by parent company to cover subsidiary's operating deficit is not deductible as a business expense); *Deputy* v. *Du Pont*, 308 U. S. 488 (1940) (expenses incurred by shareholder in helping executives of company acquire stock are not deductible); *Helvering* v. *Winmill*, 305 U. S. 79 (1938) (brokerage commissions are capital expenditures); *Welch* v. *Helvering*, 290 U. S. 111 (1933) (payments of former employer's debts are capital expenditures).

the type of business involved"). The Court has recognized, however, that the "decisive distinctions" between current expenses and capital expenditures "are those of degree and not of kind," *Welch* v. *Helvering*, 290 U. S., at 114, and that because each case "turns on its special facts," *Deputy* v. *Du Pont*, 308 U. S., at 496, the cases sometimes appear difficult to harmonize. See *Welch* v. *Helvering*, 290 U. S., at 116.

National Starch contends that the decision in *Lincoln Savings* changed these familiar backdrops and announced an exclusive test for identifying capital expenditures, a test in which "creation or enhancement of an asset" is a prerequisite to capitalization, and deductibility under § 162(a) is the rule rather than the exception. Brief for Petitioner 16. We do not agree, for we conclude that National Starch has overread *Lincoln Savings*.

In *Lincoln Savings*, we were asked to decide whether certain premiums, required by federal statute to be paid by a savings and loan association to the Federal Savings and Loan Insurance Corporation (FSLIC), were ordinary and necessary expenses under § 162(a), as Lincoln Savings argued and the Court of Appeals had held, or capital expenditures under § 263, as the Commissioner contended. We found that the "additional" premiums, the purpose of which was to provide FSLIC with a secondary reserve fund in which each insured institution retained a pro rata interest recoverable in certain situations, "serv[e] to create or enhance for Lincoln what is essentially a separate and distinct additional asset." 403 U. S., at 354. "[A]s an inevitable consequence," we concluded, "the payment is capital in nature and not an expense, let alone an ordinary expense, deductible under § 162(a)." *Ibid.*

Lincoln Savings stands for the simple proposition that a taxpayer's expenditure that "serves to create or enhance . . . a separate and distinct" asset should be capitalized under § 263. It by no means follows, however, that *only* expenditures that create or enhance separate and distinct assets are

to be capitalized under § 263. We had no occasion in *Lincoln Savings* to consider the tax treatment of expenditures that, unlike the additional premiums at issue there, did not create or enhance a specific asset, and thus the case cannot be read to preclude capitalization in other circumstances. In short, *Lincoln Savings* holds that the creation of a separate and distinct asset well may be a sufficient, but not a necessary, condition to classification as a capital expenditure. See *General Bancshares Corp.* v. *Commissioner*, 326 F. 2d 712, 716 (CA8) (although expenditures may not "resul[t] in the acquisition or increase of a corporate asset, . . . these expenditures are not, because of that fact, deductible as ordinary and necessary business expenses"), cert. denied, 379 U. S. 832 (1964).

Nor does our statement in *Lincoln Savings*, 403 U. S., at 354, that "the presence of an ensuing benefit that may have some future aspect is not controlling" prohibit reliance on future benefit as a means of distinguishing an ordinary business expense from a capital expenditure.[6] Although the mere presence of an incidental future benefit—"*some* future aspect"—may not warrant capitalization, a taxpayer's realization of benefits beyond the year in which the expenditure is incurred is undeniably important in determining whether the appropriate tax treatment is immediate deduction or capitalization. See *United States* v. *Mississippi Chemical Corp.*, 405 U. S. 298, 310 (1972) (expense that "is of value in more than one taxable year" is a nondeductible capital expenditure); *Central Texas Savings & Loan Assn.* v. *United States*, 731 F. 2d 1181, 1183 (CA5 1984) ("While the period of the benefits may not be controlling in all cases, it nonetheless

---

[6] Petitioner contends that, absent a separate-and-distinct-asset requirement for capitalization, a taxpayer will have no "principled basis" upon which to differentiate business expenses from capital expenditures. Brief for Petitioner 37–41. We note, however, that grounding tax status on the existence of an asset would be unlikely to produce the bright-line rule that petitioner desires, given that the notion of an "asset" is itself flexible and amorphous. See Johnson, 53 Tax Notes, at 477–478.

remains a prominent, if not predominant, characteristic of a capital item"). Indeed, the text of the Code's capitalization provision, § 263(a)(1), which refers to "permanent improvements or betterments," itself envisions an inquiry into the duration and extent of the benefits realized by the taxpayer.

III

In applying the foregoing principles to the specific expenditures at issue in this case, we conclude that National Starch has not demonstrated that the investment banking, legal, and other costs it incurred in connection with Unilever's acquisition of its shares are deductible as ordinary and necessary business expenses under § 162(a).

Although petitioner attempts to dismiss the benefits that accrued to National Starch from the Unilever acquisition as "entirely speculative" or "merely incidental," Brief for Petitioner 39–40, the Tax Court's and the Court of Appeals' findings that the transaction produced significant benefits to National Starch that extended beyond the tax year in question are amply supported by the record. For example, in commenting on the merger with Unilever, National Starch's 1978 "Progress Report" observed that the company would "benefit greatly from the availability of Unilever's enormous resources, especially in the area of basic technology." App. 43. See also *id.*, at 46 (Unilever "provides new opportunities and resources"). Morgan Stanley's report to the National Starch board concerning the fairness to shareholders of a possible business combination with Unilever noted that National Starch management "feels that some synergy may exist with the Unilever organization given a) the nature of the Unilever chemical, paper, plastics and packaging operations . . . and b) the strong consumer products orientation of Unilever United States, Inc." *Id.*, at 77–78.

In addition to these anticipated resource-related benefits, National Starch obtained benefits through its transformation from a publicly held, freestanding corporation into a wholly

owned subsidiary of Unilever. The Court of Appeals noted that National Starch management viewed the transaction as "'swapping approximately 3500 shareholders for one.'" 918 F. 2d, at 427; see also App. 223. Following Unilever's acquisition of National Starch's outstanding shares, National Starch was no longer subject to what even it terms the "substantial" shareholder-relations expenses a publicly traded corporation incurs, including reporting and disclosure obligations, proxy battles, and derivative suits. Brief for Petitioner 24. The acquisition also allowed National Starch, in the interests of administrative convenience and simplicity, to eliminate previously authorized but unissued shares of preferred and to reduce the total number of authorized shares of common from 8,000,000 to 1,000. See 93 T. C., at 74.

Courts long have recognized that expenses such as these, "'incurred for the purpose of changing the corporate structure for the benefit of future operations are not ordinary and necessary business expenses.'" *General Bancshares Corp.* v. *Commissioner*, 326 F. 2d, at 715 (quoting *Farmers Union Corp.* v. *Commissioner*, 300 F. 2d 197, 200 (CA9), cert. denied, 371 U. S. 861 (1962)). See also B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders 5–33 to 5–36 (5th ed. 1987) (describing "well-established rule" that expenses incurred in reorganizing or restructuring corporate entity are not deductible under § 162(a)). Deductions for professional expenses thus have been disallowed in a wide variety of cases concerning changes in corporate structure.[7] Although support for these decisions can be

[7] See, *e. g.*, *McCrory Corp.* v. *United States*, 651 F. 2d 828 (CA2 1981) (statutory merger under 26 U. S. C. § 368(a)(1)(A)); *Bilar Tool & Die Corp.* v. *Commissioner*, 530 F. 2d 708 (CA6 1976) (division of corporation into two parts); *E. I. du Pont de Nemours & Co.* v. *United States*, 432 F. 2d 1052 (CA3 1970) (creation of new subsidiary to hold assets of prior joint venture); *General Bancshares Corp.* v. *Commissioner*, 326 F. 2d 712, 715 (CA8) (stock dividends), cert. denied, 379 U. S. 832 (1964); *Mills Estate, Inc.* v. *Commissioner*, 206 F. 2d 244 (CA2 1953) (recapitalization).

found in the specific terms of § 162(a), which require that deductible expenses be "ordinary and necessary" and incurred "in carrying on any trade or business,"[8] courts more frequently have characterized an expenditure as capital in nature because "the purpose for which the expenditure is made has to do with the corporation's operations and betterment, sometimes with a continuing capital asset, for the duration of its existence or for the indefinite future or for a time somewhat longer than the current taxable year." *General Bancshares Corp.* v. *Commissioner*, 326 F. 2d, at 715. See also *Mills Estate, Inc.* v. *Commissioner*, 206 F. 2d 244, 246 (CA2 1953). The rationale behind these decisions applies equally to the professional charges at issue in this case.

IV

The expenses that National Starch incurred in Unilever's friendly takeover do not qualify for deduction as "ordinary and necessary" business expenses under § 162(a). The fact that the expenditures do not create or enhance a separate and distinct additional asset is not controlling; the acquisition-related expenses bear the indicia of capital expenditures and are to be treated as such.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

---

[8] See, *e. g.*, *Motion Picture Capital Corp.* v. *Commissioner*, 80 F. 2d 872, 873–874 (CA2 1936) (recognizing that expenses may be "ordinary and necessary" to corporate merger, and that mergers may be "ordinary and necessary business occurrences," but declining to find that merger is part of "ordinary and necessary business activities," and concluding that expenses are therefore not deductible); Greenstein, The Deductibility of Takeover Costs After *National Starch*, 69 Taxes 48, 49 (1991) (expenses incurred to facilitate transfer of business ownership do not satisfy the "carrying on [a] trade or business" requirement of § 162(a)).

Syllabus

ARKANSAS ET AL. *v.* OKLAHOMA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90–1262. Argued December 11, 1991—Decided February 26, 1992*

The Clean Water Act provides for two sets of water quality measures: effluent limitations, which are promulgated by the Environmental Protection Agency (EPA or Agency), and water quality standards, which are promulgated by the States. The Act generally prohibits the discharge of effluent into a navigable body of water unless the point source obtains a National Pollution Discharge Elimination System (NPDES) permit from a State with an EPA-approved permit program or from the EPA itself. A Fayetteville, Arkansas, sewage treatment plant received an EPA-issued permit, authorizing it to discharge effluent into a stream that ultimately reaches the Illinois River upstream from the Oklahoma border. Respondents, Oklahoma and other Oklahoma parties, challenged the permit before the EPA, alleging, *inter alia*, that the discharge violated Oklahoma water quality standards, which allow no degradation of water quality in the upper Illinois River. The EPA's Chief Judicial Officer remanded the initial affirmance of the permit by the Administrative Law Judge (ALJ), ruling that the Act requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards, and that those standards would be violated only if the record shows by a preponderance of the evidence that the discharge would cause an actual *detectable* violation of Oklahoma's water quality standards. The ALJ then made detailed findings of fact, concluding that Fayetteville had satisfied the Chief Judicial Officer's standard, and the Chief Judicial Officer sustained the permit's issuance. The Court of Appeals reversed, ruling that the Act does not allow a permit to be issued where a proposed source would discharge effluent that would contribute to conditions currently constituting a violation of applicable water quality standards. It concluded that the Illinois River was already degraded, that the Fayetteville effluent would reach the river in Oklahoma, and that the effluent would contribute to the river's deterioration even though it would not detectably affect the river's water quality.

---

*Together with No. 90–1266, *Environmental Protection Agency* v. *Oklahoma et al.*, also on certiorari to the same court.

Syllabus

Held: The EPA's action was authorized by the Clean Water Act. Pp. 98–114.

(a) Where interstate discharge is involved, both federal common law of nuisance, *Milwaukee* v. *Illinois*, 451 U. S. 304, and an affected State's common law, *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 493, are pre-empted. Affected States may not block a permit, but must apply to the EPA Administrator, who may disapprove a plan if he concludes that the discharge will have an undue impact on interstate waters. *Id.*, at 490–491. Pp. 98–101.

(b) The EPA has construed the Act as requiring that EPA-issued permits comply with the requirements for a permit issued under an approved state plan and with § 401(a) of the Act, which appears to prohibit the issuance of a federal permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be insured. Pp. 101–103.

(c) The EPA's requirement that the Fayetteville discharge comply with Oklahoma's water quality standards is a reasonable exercise of the substantial statutory discretion Congress has vested in the Agency. There is no need to address the question whether the Act requires compliance with affected States' standards, for it clearly does not limit the EPA's authority to mandate such compliance. EPA regulations, which since 1973 have required that an NPDES permit not be issued when compliance with affected States' water quality standards cannot be insured, are a reasonable exercise of the Agency's discretion and are a well-tailored means of reaching the Act's goal of achieving state water quality standards. The EPA's authority is not constrained by the limits in *Ouellette, supra*, concerning an affected State's direct input into the permit process, does not conflict with the Act's legislative history and statutory scheme, and is not incompatible with the balance among competing policies and interests that Congress struck in the Act. Pp. 104–107.

(d) Contrary to the Court of Appeals' interpretation, nothing in the Act mandates a complete ban on discharges into a waterway that is in violation of existing water quality standards. Instead, the Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution. Pp. 107–108.

(e) The Court of Appeals exceeded the legitimate scope of judicial review of an agency adjudication when it invalidated the EPA's issuance of the permit on the ground that the Agency misinterpreted Oklahoma's water quality standards. It substituted its own reading of the law for the EPA's. Thus, it failed to give substantial deference to the Agency's reasonable, consistently held interpretation of its own regulations, which incorporate the Oklahoma standards. It also disregarded well-

Syllabus

established standards for reviewing factual findings of agencies by making its own factual findings when the ALJ's findings were supported by substantial evidence. See generally *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474. As a result, the court's conclusion that the river's degradation was an important and relevant factor which the EPA failed to consider was based on its own erroneous interpretation of the controlling law. Had it been properly respectful of the EPA's permissible reading of the Act—that what matters is not the river's current status, but whether the proposed discharge will have a detectable effect on that status—it would not have adjudged the Agency's decision arbitrary and capricious. Pp. 109–114.

908 F. 2d 595, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Edward W. Warren argued the cause for petitioners in No. 90–1262. With him on the briefs were *Winston Bryant*, Attorney General of Arkansas, *Mary B. Stallcup*, *Angela S. Jegley*, *David G. Norrell*, *James N. McCord*, *Walter R. Niblock*, and *Nancy L. Hamm*. *Deputy Solicitor General Wallace* argued the cause for petitioner in No. 90–1266. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Stewart*, *Harriet S. Shapiro*, *Michael A. McCord*, *Anne S. Almy*, *Gary S. Guzy*, and *E. Donald Elliott*.

Robert A. Butkin, Assistant Attorney General of Oklahoma, argued the cause for respondents in both cases. With him on the brief for respondents State of Oklahoma et al. were *Susan B. Loving*, Attorney General, *Brita Haugland Cantrell*, Assistant Attorney General, and *Julian Fite*. *Theodore E. Dinsmoor* and *Susan Hedman* filed a brief for respondent Oklahoma Wildlife Federation.†

---

†Briefs of *amici curiae* urging reversal were filed for the State of Colorado by *Gale A. Norton*, Attorney General, *Raymond T. Slaughter*, Chief Deputy Attorney General, *Timothy M. Tymkovich*, Solicitor General, *Martha E. Rudolph*, Assistant Attorney General, and *Martha Phillips Allbright*; for the State of Nevada et al. by *Nicholas J. Spaeth*, Attorney General of North Dakota, *Frankie Sue Del Papa*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, and *Mark*

JUSTICE STEVENS delivered the opinion of the Court.

Pursuant to the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*, the Environmental Protection Agency (EPA or Agency) issued a discharge permit to a new point source in Arkansas, about 39 miles upstream from the Oklahoma state line. The question presented in this litigation is whether the EPA's finding that discharges from the new source would not cause a detectable violation of Oklaho-

---

Barnett, Attorney General of South Dakota; for the Association of Metropolitan Sewerage Agencies et al. by *Lee C. White*, *Benjamin L. Brown*, *Howard Holme*, *Don A. Zimmerman*, *Geoff Wilson*, *Thomas W. Kelty*, *James M. Kaup*, *Fred G. Stickel III*, *Robert E. Johnson*, *John E. Gotherman*, *Mark I. Wallach*, *Roy D. Bates*, *Ogden Stokes*, *Thomas S. Smith*, *Robert J. Alfton*, and *John Dodge*; for Champion International Corp. et al. by *J. Jeffrey McNealey*, *Michael K. Glenn*, *Theodore L. Garrett*, *Corinne A. Goldstein*, *Charles R. Nestrud*, *Richard A. Flye*, *Jerry C. Jones*, and *Jess Askew III*; for the Colorado Water Congress by *Mark T. Pifher*; and for the Mountain States Legal Foundation et al. by *William Perry Pendley*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Roland W. Burris*, Attorney General of Illinois, *Rosalyn Kaplan*, Solicitor General, and *James L. Morgan*, Assistant Attorney General, *Charles W. Burson*, Attorney General of Tennessee, *John Knox Walkup*, Solicitor General, and *Michael D. Pearigen*, Deputy Attorney General, *Jimmy Evans*, Attorney General of Alabama, *Grant Woods*, Attorney General of Arizona, *Daniel E. Lungren*, Attorney General of California, *Richard Blumenthal*, Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Michael E. Carpenter*, Attorney General of Maine, and *Jon H. Edwards*, Assistant Attorney General, *Frank J. Kelley*, Attorney General of Michigan, *Mike Moore*, Attorney General of Mississippi, *Robert J. Del Tufo*, Attorney General of New Jersey, and *T. Travis Medlock*, Attorney General of South Carolina; for the Cherokee Nation of Oklahoma by *Jim Wilcoxen*; for the Natural Resources Defense Council et al. by *Jessica C. Landman* and *Mark Van Putten*; for the Scenic Rivers Association of Oklahoma et al. by *Kathy Carter-White*, *Joel Glenn Richardson*, *Harvey Chaffin*, and *Bill J. Ballard*; for the Sierra Club by *Stephan C. Volker*; for the U. S. Senator from Oklahoma, Don Nickles, et al. by *James George Jatras*; and for *Mike Synar*, Member of Congress, *pro se*.

ma's water quality standards satisfied the EPA's duty to protect the interests of the downstream State. Disagreeing with the Court of Appeals, we hold that the Agency's action was authorized by the statute.

I

In 1985, the city of Fayetteville, Arkansas, applied to the EPA, seeking a permit for the city's new sewage treatment plant under the National Pollution Discharge Elimination System (NPDES). After the appropriate procedures, the EPA, pursuant to § 402(a)(1) of the Act, 33 U. S. C. § 1342(a)(1), issued a permit authorizing the plant to discharge up to half of its effluent (to a limit of 6.1 million gallons per day) into an unnamed stream in northwestern Arkansas.[1] That flow passes through a series of three creeks for about 17 miles, and then enters the Illinois River at a point 22 miles upstream from the Arkansas-Oklahoma border.

The permit imposed specific limitations on the quantity, content, and character of the discharge and also included a number of special conditions, including a provision that if a study then underway indicated that more stringent limitations were necessary to ensure compliance with Oklahoma's water quality standards, the permit would be modified to incorporate those limits. App. 84.

Respondents challenged this permit before the EPA, alleging, *inter alia*, that the discharge violated the Oklahoma water quality standards. Those standards provide that "no degradation [of water quality] shall be allowed" in the upper Illinois River, including the portion of the river immediately downstream from the state line.[2]

---

[1] The permit also authorized the plant to discharge the remainder of its effluent into the White River, a river that does not flow into Oklahoma; this aspect of the permit is not at issue in this litigation.

[2] Section 5 of the Oklahoma water quality standards provides:

"All streams and bodies of water designated as (a) are protected by prohibition of any new point source discharge of wastes or increased load

Following a hearing, the Administrative Law Judge (ALJ) concluded that the Oklahoma standards would not be implicated unless the contested discharge had "something more than a mere *de minimis* impact" on the State's waters. He found that the discharge would not have an "undue impact" on Oklahoma's waters and, accordingly, affirmed the issuance of the permit. App. to Pet. for Cert. in No. 90–1262, pp. 101a–103a (emphasis deleted).

On a petition for review, the EPA's Chief Judicial Officer first ruled that §301(b)(1)(C) of the Clean Water Act "requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards."[3] *Id.*, at 116a–117a. He then held that the Act

---

from an existing point source except under conditions described in Section 3.

"All streams designated by the State as 'scenic river areas,' and such tributaries of those streams as may be appropriate will be so designated. Best management practices for control of nonpoint source discharge should be initiated when feasible." App. 46–47.

Oklahoma has designated the portion of the Illinois River immediately downstream from the state line as a "scenic river." Okla. Stat., Tit. 82, §1452(b)(1) (Supp. 1989); see also App. 54.

Section 3 of the Oklahoma water quality standards provides, in relevant part:

"The intent of the Anti-degradation Policy is to protect all waters of the State from quality degradation. Existing instream water uses shall be maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed. Oklahoma's waters constitute a valuable State resource and shall be protected, maintained and improved for the benefit of all the citizens.

. . . . .

"No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in national and State parks, Wildlife Refuges, and those designated 'Scenic Rivers' in Appendix A." App. 27–28.

[3] Section 301(b)(1)(C) provides, in relevant part, that

"there shall be achieved—

. . . . .

and EPA regulations offered greater protection for the downstream State than the ALJ's "undue impact" standard suggested. He explained the proper standard as follows:

> "[A] mere theoretical impairment of Oklahoma's water quality standards—*i. e.*, an infinitesimal impairment predicted through modeling but not expected to be actually detectable or measurable—should not by itself block the issuance of the permit. In this case, the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards." *Id.*, at 117a (emphasis in original).

On remand, the ALJ made detailed findings of fact and concluded that the city had satisfied the standard set forth by the Chief Judicial Officer. Specifically, the ALJ found that there would be no detectable violation of any of the components of Oklahoma's water quality standards. *Id.*, at 127a–143a. The Chief Judicial Officer sustained the issuance of the permit. *Id.*, at 145a–153a.

Both the petitioners in No. 90–1262 (collectively Arkansas) and the respondents in this litigation sought judicial review.[4] Arkansas argued that the Clean Water Act did not require an Arkansas point source to comply with Oklahoma's water quality standards. Oklahoma challenged the EPA's determination that the Fayetteville discharge would not produce a detectable violation of the Oklahoma standards.

The Court of Appeals did not accept either of these arguments. The court agreed with the EPA that the statute required compliance with Oklahoma's water quality standards,

---

"(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet *water quality standards . . . established pursuant to any State law or regulations* . . . or required to implement any applicable water quality standard established pursuant to this chapter." 33 U. S. C. § 1311(b)(1)(C) (emphasis added).

[4] The Arkansas petition was filed in the Court of Appeals for the Eighth Circuit and transferred to the Tenth Circuit where it was consolidated with the petition filed by the respondents.

see 908 F. 2d 595, 602–615 (CA10 1990), and did not disagree with the Agency's determination that the discharges from the Fayetteville plant would not produce a detectable violation of those standards. *Id.*, at 631–633. Nevertheless, relying on a theory that neither party had advanced, the Court of Appeals reversed the Agency's issuance of the Fayetteville permit. The court first ruled that the statute requires that "where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted." *Id.*, at 620. Then the court found that the Illinois River in Oklahoma was "already degraded," that the Fayetteville effluent would reach the Illinois River in Oklahoma, and that that effluent could "be expected to contribute to the ongoing deterioration of the scenic [Illinois R]iver" in Oklahoma even though it would not detectably affect the river's water quality. *Id.*, at 621–629.

The importance and the novelty of the Court of Appeals' decision persuaded us to grant certiorari. 499 U. S. 946 (1991). We now reverse.

II

Interstate waters have been a font of controversy since the founding of the Nation. *E. g.*, *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). This Court has frequently resolved disputes between States that are separated by a common river, see, *e. g.*, *Ohio* v. *Kentucky*, 444 U. S. 335 (1980), that border the same body of water, see, *e. g.*, *New York* v. *New Jersey*, 256 U. S. 296 (1921), or that are fed by the same river basin, see, *e. g.*, *New Jersey* v. *New York*, 283 U. S. 336 (1931).

Among these cases are controversies between a State that introduces pollutants to a waterway and a downstream State that objects. See, *e. g.*, *Missouri* v. *Illinois*, 200 U. S. 496 (1906). In such cases, this Court has applied principles of common law tempered by a respect for the sovereignty of the States. Compare *id.*, at 521, with *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907). In forging what "may

not improperly be called interstate common law," *Illinois* v. *Milwaukee*, 406 U. S. 91, 105–106 (1972) *(Milwaukee I)*, however, we remained aware "that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id.*, at 107.

In *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981) *(Milwaukee II)*, we held that the Federal Water Pollution Control Act Amendments of 1972 did just that. In addressing Illinois' claim that Milwaukee's discharges into Lake Michigan constituted a nuisance, we held that the comprehensive regulatory regime created by the 1972 amendments pre-empted Illinois' federal common law remedy. We observed that Congress had addressed many of the problems we had identified in *Milwaukee I* by providing a downstream State with an opportunity for a hearing before the source State's permitting agency, by requiring the latter to explain its failure to accept any recommendations offered by the downstream State, and by authorizing the EPA, in its discretion, to veto a source State's issuance of any permit if the waters of another State may be affected. *Milwaukee II*, 451 U. S., at 325–326.

In *Milwaukee II*, the Court did not address whether the 1972 amendments had supplanted *state* common law remedies as well as the federal common law remedy. See *id.*, at 310, n. 4. On remand, Illinois argued that § 510 of the Clean Water Act, 33 U. S. C. § 1370, expressly preserved the State's right to adopt and enforce rules that are more stringent than federal standards.[5] The Court of Appeals accepted Illinois' reading of § 510, but held that that section did "no more than

[5] Section 510 provides in relevant part:

"Except as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution [with exceptions]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States *with respect to the waters (including boundary waters) of such States.*" 33 U. S. C. § 1370 (emphasis added).

to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters." *Illinois* v. *Milwaukee*, 731 F. 2d 403, 413 (CA7 1984), cert. denied, 469 U. S. 1196 (1985).

This Court subsequently endorsed that analysis in *International Paper Co.* v. *Ouellette*, 479 U. S. 481 (1987), in which Vermont property owners claimed that the pollution discharged into Lake Champlain by a paper company located in New York constituted a nuisance under Vermont law. The Court held the Clean Water Act taken "as a whole, its purposes and its history" pre-empted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is "the law of the State in which the point source is located." *Id.*, at 493, 487. Moreover, in reviewing § 402(b) of the Act, the Court pointed out that when a new permit is being issued by the source State's permit-granting agency, the downstream State

> "does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. § 1342(d)(2). . . . Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program." *Id.*, at 490–491.[6]

[6] This description of the downstream State's role in the issuance of a new permit by a source State was apparently consistent with the EPA's interpretation of the Act at the time. The Government's *amicus curiae* brief in *Ouellette* stated that "the affected neighboring state [has] only an advisory role in the formulation of applicable effluent standards or limitations. The affected state may try to persuade the federal government or the source state to increase effluent requirements, but *ultimately possesses no statutory authority to compel that result, even when its waters are adversely affected by out-of-state pollution.* See 33 U. S. C. § 1341(a)(2), 1342(b)(3) and (5) . . . ." Brief for United States as *Amicus Curiae*, O. T. 1986, No. 85–1233, p. 19 (emphasis added; footnote omitted).

Unlike the foregoing cases, this litigation involves not a state-issued permit, but a federally issued permit. To explain the significance of this distinction, we comment further on the statutory scheme before addressing the specific issues raised by the parties.

III

The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). Toward this end, the Act provides for two sets of water quality measures. "Effluent limitations" are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. See §§ 1311, 1314. "[W]ater quality standards" are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 205, n. 12 (1976).

The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, § 303 of the Act requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U. S. C. § 1313(c).

The primary means for enforcing these limitations and standards is the NPDES, enacted in 1972 as a critical part of Congress' "complete rewriting" of federal water pollution

law. *Milwaukee II*, 451 U. S., at 317. Section 301(a) of the Act, 33 U. S. C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit. Section 402 establishes the NPDES permitting regime, and describes two types of permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program administered by the EPA.

Section 402(b) authorizes each State to establish "its own permit program for discharges into navigable waters within its jurisdiction." 33 U. S. C. § 1342(b). Among the requirements the state program must satisfy are the procedural protections for downstream States discussed in *Ouellette* and *Milwaukee II*. See §§ 1342(b)(3), (5).[7] Although these provisions do not authorize the downstream State to veto the issuance of a permit for a new point source in another State, the Administrator retains authority to block the issuance of any state-issued permit that is "outside the guidelines and requirements" of the Act. § 1342(d)(2).[8]

---

[7] Section 402(b) requires state permit programs

"(3) [t]o insure that . . . any other State the waters of which may be affected . . . receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

. . . . . .

"(5) [t]o insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing." 33 U. S. C. § 1342(b).

Although § 402(b) focuses on state-issued permits, § 402(a)(3) requires that, in issuing an NPDES permit, the Administrator follow the same procedures required of state permit programs. See 33 U. S. C. § 1342(a)(3); see also § 1341(a)(2).

[8] Section 402(d)(2) provides:

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects

In the absence of an approved state program, the EPA may issue an NPDES permit under § 402(a) of the Act. (In these cases, for example, because Arkansas had not been authorized to issue NPDES permits when the Fayetteville plant was completed, the permit was issued by the EPA itself.) The EPA's permit program is subject to the "same terms, conditions, and requirements" as a state permit program. 33 U. S. C. § 1342(a)(3). Notwithstanding this general symmetry, the EPA has construed the Act as requiring that EPA-issued NPDES permits also comply with § 401(a). That section, which predates § 402 and the NPDES, applies to a broad category of federal licenses, and sets forth requirements for "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters." 33 U. S. C. § 1341(a). Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured.[9]

---

in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator." 33 U. S. C. § 1342(d)(2).

[9] Section 401(a)(2) provides, in relevant part:

"Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administra-

IV

The parties have argued three analytically distinct questions concerning the interpretation of the Clean Water Act. First, does the Act require the EPA, in crafting and issuing a permit to a point source in one State, to apply the water quality standards of downstream States? Second, even if the Act does not *require* as much, does the Agency have the statutory authority to mandate such compliance? Third, does the Act provide, as the Court of Appeals held, that once a body of water fails to meet water quality standards no discharge that yields effluent that reach the degraded waters will be permitted?

In these cases, it is neither necessary nor prudent for us to resolve the first of these questions. In issuing the Fayetteville permit, the EPA assumed it was obligated by both the Act and its own regulations to ensure that the Fayetteville discharge would not violate Oklahoma's standards. See App. to Pet. for Cert. in No. 90–1262, pp. 116a–117a, and n. 14. As we discuss below, this assumption was permissible and reasonable and therefore there is no need for us to address whether the Act requires as much. Moreover, much of the analysis and argument in the briefs of the parties relies on statutory provisions that govern not only federal permits issued pursuant to §§ 401(a) and 402(a), but also state permits issued under § 402(b). It seems unwise to evaluate those arguments in a case such as these, which only involve a federal permit.

---

tor shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit." 33 U. S. C. § 1341(a)(2).

Our decision not to determine at this time the scope of the Agency's statutory *obligations* does not affect our resolution of the second question, which concerns the Agency's statutory *authority*. Even if the Clean Water Act itself does not require the Fayetteville discharge to comply with Oklahoma's water quality standards, the statute clearly does not limit the EPA's authority to mandate such compliance.

Since 1973, EPA regulations have provided that an NPDES permit shall not be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."[10] 40 CFR § 122.4(d) (1991); see also 38 Fed. Reg. 13533 (1973); 40 CFR § 122.44(d) (1991). Those regulations—relied upon by the EPA in the issuance of the Fayetteville permit—constitute a reasonable exercise of the Agency's statutory authority.

Congress has vested in the Administrator broad discretion to establish conditions for NPDES permits. Section 402(a)(2) provides that for EPA-issued permits "[t]he Administrator shall prescribe conditions . . . to assure compliance with the requirements of [§ 402(a)(1)] and *such other requirements as he deems appropriate.*" 33 U. S. C. § 1342(a)(2) (emphasis added). Similarly, Congress preserved for the Administrator broad authority to oversee state permit programs:

> "No permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter." § 1342(d)(2).

The regulations relied on by the EPA were a perfectly reasonable exercise of the Agency's statutory discretion. The application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose "to restore and maintain the chemical, physical, and

[10] This restriction applies whether the permit is issued by the EPA or by an approved state program. See 40 CFR § 123.25 (1991).

biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). Moreover, as noted above, § 301(b)(1)(C) expressly identifies the achievement of state water quality standards as one of the Act's central objectives. The Agency's regulations conditioning NPDES permits are a well-tailored means of achieving this goal.

Notwithstanding this apparent reasonableness, Arkansas argues that our description in *Ouellette* of the role of affected States in the permit process and our characterization of the affected States' position as "subordinate," see 479 U. S., at 490–491, indicates that the EPA's application of the Oklahoma standards was error. We disagree. Our statement in *Ouellette* concerned only an affected State's input into the permit process; that input is clearly limited by the plain language of § 402(b). Limits on an affected State's direct participation in permitting decisions, however, do not in any way constrain the *EPA's* authority to require a point source to comply with downstream water quality standards.

Arkansas also argues that regulations requiring compliance with downstream standards are at odds with the legislative history of the Act and with the statutory scheme established by the Act. Although we agree with Arkansas that the Act's legislative history indicates that Congress intended to grant the Administrator discretion in his oversight of the issuance of NPDES permits,[11] we find nothing in that history to indicate that Congress intended to preclude the EPA from establishing a general requirement that such permits be conditioned to ensure compliance with downstream water quality standards.

Similarly, we agree with Arkansas that in the Clean Water Act Congress struck a careful balance among competing policies and interests, but do not find the EPA regulations con-

---

[11] See, *e. g.*, 1 Legislative History of Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, pp. 322, 388–389, 814 (1973); see also 33 U. S. C. § 1342(d)(3).

cerning the application of downstream water quality standards at all incompatible with that balance. Congress, in crafting the Act, protected certain sovereign interests of the States; for example, § 510 allows States to adopt more demanding pollution-control standards than those established under the Act. Arkansas emphasizes that § 510 preserves such state authority only as it is applied to the waters of the regulating State. Even assuming Arkansas' construction of § 510 is correct, cf. *id.*, at 493, that section only concerns *state* authority and does not constrain the *EPA's* authority to promulgate reasonable regulations requiring point sources in one State to comply with water quality standards in downstream States.

For these reasons, we find the EPA's requirement that the Fayetteville discharge comply with Oklahoma's water quality standards to be a reasonable exercise of the Agency's substantial statutory discretion. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984).

V

The Court of Appeals construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards.[12] We find nothing in the Act to support this reading.

---

[12] "[W]e hold that the Clean Water Act prohibits granting an NPDES permit under the circumstances of this case (i. e., where applicable water quality standards have already been violated) and reverse EPA's decision to permit Fayetteville to discharge any part of its effluent to the Illinois River Basin." 908 F. 2d 595, 616 (CA10 1990).

"Congress cannot reasonably be presumed to have intended to exclude from the CWA's 'all-encompassing program,' 451 U. S., at 318, a permitting decision arising in circumstances such as those of this case. It is even more unfathomable that Congress fashioned a '*comprehensive* . . . policy for the *elimination* of water pollution,' *id.*, which sanctions continued pollution once minimum water quality standards have been transgressed. More likely, Congress simply never contemplated that EPA or a state would consider it permissible to authorize further pollution under such

The interpretation of the statute adopted by the court had not been advanced by any party during the Agency or court proceedings. Moreover, the Court of Appeals candidly acknowledged that its theory "has apparently never before been addressed by a federal court." 908 F. 2d, at 620, n. 39. The only statutory provision the court cited to support its legal analysis was § 402(h), see *id.*, at 633, which merely authorizes the EPA (or a state permit program) to prohibit a publicly owned treatment plant that is violating a condition of its NPDES permit from accepting any additional pollutants for treatment until the ongoing violation has been corrected. See 33 U. S. C. § 1342(h).

Although the Act contains several provisions directing compliance with state water quality standards, see, *e. g.*, § 1311(b)(1)(C), the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. See, *e. g.*, § 1313(d). Thus, rather than establishing the categorical ban announced by the Court of Appeals—which might frustrate the construction of new plants that would improve existing conditions—the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution. See, *e. g.*, § 1288(b)(2).

To the extent that the Court of Appeals relied on its interpretation of the Act to reverse the EPA's permitting decision, that reliance was misplaced.

---

circumstances. We will not ascribe to the Act either the gaping loophole or the irrational purpose necessary to uphold EPA's action in this case." *Id.*, at 632 (footnotes omitted).

VI

The Court of Appeals also concluded that the EPA's issuance of the Fayetteville permit was arbitrary and capricious because the Agency misinterpreted Oklahoma's water quality standards. The primary difference[13] between the court's and the Agency's interpretation of the standards derives from the court's construction of the Act. Contrary to the EPA's interpretation of the Oklahoma standards, the Court of Appeals read those standards as containing the same categorical ban on new discharges that the court had found in the Clean Water Act itself. Although we do not believe the text of the Oklahoma standards supports the court's reading (indeed, we note that Oklahoma itself had not advanced that interpretation in its briefs in the Court of Appeals), we reject it for a more fundamental reason—namely, that the Court of Appeals exceeded the legitimate scope of judicial review of an agency adjudication. To emphasize the importance of this point, we shall first briefly assess the soundness of the EPA's interpretation and application of the Oklahoma

---

[13] The court identified three errors in the EPA's reading of the Oklahoma standards. First, the court correctly observed that the ALJ and the Chief Judicial Officer misinterpreted § 4.10(c) of the standards as governing only the discharge of phosphorus into lakes, rather than the discharge of phosphorus into lakes and into all "perennial and intermittent streams." *Id.*, at 617 (emphasis omitted). This error was harmless because the ALJ found that the discharge into Lake Francis would comply with § 4.10(c) and it is undisputed that that discharge produced a greater threat to the slow-moving water of the lake than to the rapid flow in the river.

The second flaw identified by the court was the ALJ's mistaken reliance on the 1985, rather than the 1982 version, of the Oklahoma standards. We agree with the Chief Judicial Officer, who also noted this error, that the portions of the two versions relevant to this case "do not differ materially." App. to Pet. for Cert. in No. 90–1262, p. 150a. Therefore, this error was also harmless.

Because these two errors were harmless, we have focused in the text on the major difference between the court's and the EPA's readings of the Oklahoma standards: the "no degradation" provision.

standards and then comment more specifically on the Court of Appeals' approach.

As discussed above, an EPA regulation requires an NPDES permit to comply "with the applicable water quality requirements of all affected States." 40 CFR § 122.4(d) (1991). This regulation effectively incorporates into federal law those state-law standards the Agency reasonably determines to be "applicable." In such a situation, then, state water quality standards—promulgated by the States with substantial guidance from the EPA[14] and approved by the Agency—are part of the federal law of water pollution control.

Two features of the body of law governing water pollution support this conclusion. First, as discussed more thoroughly above, we have long recognized that interstate water pollution is controlled by *federal* law. See *supra*, at 98–100. Recognizing that the system of federally approved state standards as applied in the interstate context constitutes federal law is wholly consistent with this principle. Second, treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation.

Because we recognize that, at least insofar as they affect the issuance of a permit in another State, the Oklahoma standards have a federal character, the EPA's reasonable, consistently held interpretation of those standards is entitled to substantial deference. Cf. *INS* v. *National Center for Immigrants' Rights*, 502 U. S. 183, 189–190 (1991); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In these cases, the Chief Judicial Officer ruled that the Oklahoma standards—which require that there be "no degradation" of the upper Illinois River—would

[14] See *supra*, at 101. Oklahoma's water quality standards closely track the EPA's model standards in effect at that time. Compare § 3 of the Oklahoma standards with 40 CFR § 35.1550(e)(1) (1981).

only be violated if the discharge effected an "actually detectable or measurable" change in water quality. App. to Pet. for Cert. in No. 90–1262, p. 117a.

This interpretation of the Oklahoma standards is certainly reasonable and consistent with the purposes and principles of the Clean Water Act. As the Chief Judicial Officer noted, "unless there is some method for measuring compliance, there is no way to ensure compliance." *Id.*, at 118a, n. 16 (internal quotation marks omitted; citation omitted). Moreover, this interpretation of the Oklahoma standards makes eminent sense in the interstate context: If every discharge that had some theoretical impact on a downstream State were interpreted as "degrading" the downstream waters, downstream States might wield an effective veto over upstream discharges.

The EPA's application of those standards in these cases was also sound. On remand, the ALJ scrutinized the record and made explicit factual findings regarding four primary measures of water quality under the Oklahoma standards: eutrophication,[15] esthetics,[16] dissolved oxygen,[17] and met-

---

[15] Eutrophication is the "normally slow aging process by which a lake evolves into a bog or marsh . . . . During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby 'choking' the lake . . . ." App. 57–58. With regard to eutrophication, the ALJ found that the Fayetteville plant would discharge 30 pounds of phosphorus per day, only about 6 pounds of which would reach the Arkansas/Oklahoma border, and that such a small amount would not result in an increase in eutrophication. App. to Pet. for Cert. in No. 90–1262, p. 129a.

[16] With regard to esthetics, the ALJ concluded that the only discharged compound that would affect esthetics was phosphorus and that, again, the amount of that substance crossing the border would not affect the esthetic quality of Oklahoma's waters. *Id.*, at 135a–136a.

[17] With regard to dissolved oxygen, the ALJ found that in the 39 miles between discharge and the border the effluent would experience "complete oxygen recovery" and therefore would not affect the dissolved oxygen levels in the river. *Id.*, at 140a.

als.[18] In each case, the ALJ found that the Fayetteville discharge would not lead to a detectable change in water quality. He therefore concluded that the Fayetteville discharge would not violate the Oklahoma water quality standards. Because we agree with the Agency's Chief Judicial Officer that these findings are supported by substantial evidence, we conclude that the Court of Appeals should have affirmed both the EPA's construction of the regulations and the issuance of the Fayetteville permit.

In its review of the EPA's interpretation and application of the Oklahoma standards, the Court of Appeals committed three mutually compounding errors.

First, the court failed to give due regard to the EPA's interpretation of its own regulations, as those regulations incorporate the Oklahoma standards. Instead the court voiced its own interpretation of the governing law and concluded that "where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted." 908 F. 2d, at 620. As we have already pointed out, that reading of the law is not supported by the statute or by any EPA regulation. The Court of Appeals sat in review of an agency action and should have afforded the EPA's interpretation of the governing law an appropriate level of deference. See generally *Chevron*, *supra*, at 842–844.

Second, the court disregarded well-established standards for reviewing the factual findings of agencies and instead made its own factual findings. The troubling nature of the court's analysis appears on the face of the opinion itself: At least four times, the court concluded that "there was substantial evidence before the ALJ to support" particular findings which the court thought appropriate, but which were

[18] With regard to metals, the ALJ concluded that the concentrations of metals would be so low as not to violate the Oklahoma standards. *Id.*, at 143a.

contrary to those actually made by the ALJ. 908 F. 2d, at 620, 625, 627, 629. Although we have long recognized the "substantial evidence" standard in administrative law, the court below turned that analysis on its head. A court reviewing an agency's adjudicative action should accept the *agency's* factual findings if those findings are supported by substantial evidence on the record as a whole. See generally *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951). The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.

Third, the court incorrectly concluded that the EPA's decision was arbitrary and capricious. This error is derivative of the court's first two errors. Having substituted its reading of the governing law for the Agency's, and having made its own factual findings, the Court of Appeals concluded that the EPA erred in not considering an important and relevant fact—namely, that the upper Illinois River was (by the court's assessment) already degraded.

As we have often recognized, an agency ruling is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983). However, in these cases, the degraded status of the river is only an "important aspect" because of the Court of Appeals' novel and erroneous interpretation of the controlling law. Under the EPA's interpretation of that law, what matters is not the river's current status, but rather whether the proposed discharge will have a "detectable effect" on that status. If the Court of Appeals had been properly respectful of the Agency's permissible reading of the Act and the Oklahoma standards, the court would not have adjudged the Agency's decision arbitrary and capricious for this reason.

In sum, the Court of Appeals made a policy choice that it was not authorized to make. Arguably, as that court sug-

gested, it might be wise to prohibit any discharge into the Illinois River, even if that discharge would have no adverse impact on water quality. But it was surely not arbitrary for the EPA to conclude—given the benefits to the river from the increased flow of relatively clean water[19] and the benefits achieved in Arkansas by allowing the new plant to operate as designed—that allowing the discharge would be even wiser. It is not our role, or that of the Court of Appeals, to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency.

Accordingly, the judgment of the Court of Appeals is

Reversed.

---

[19] Justice Holmes recognized this potential benefit years ago:

"There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois River in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fisherman, it is said, without evil results." *Missouri* v. *Illinois*, 200 U. S. 496, 522 (1906).

Syllabus

COLLINS *v.* CITY OF HARKER HEIGHTS, TEXAS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–1279. Argued November 5, 1991—Decided February 26, 1992

Larry Collins, an employee in respondent city's sanitation department, died of asphyxia after entering a manhole to unstop a sewer line. Petitioner, his widow, brought this action under 42 U. S. C. § 1983, alleging, *inter alia*, that Collins had a right under the Due Process Clause of the Fourteenth Amendment "to be free from unreasonable risks of harm . . . and . . . to be protected from the [city's] custom and policy of deliberate indifference toward [its employees'] safety"; that the city had violated that right by following a custom and policy of not training its employees about the dangers of working in sewers and not providing safety equipment and warnings; and that the city had systematically and intentionally failed to provide the equipment and training required by a Texas statute. The District Court dismissed the complaint on the ground that it did not allege a constitutional violation. Without reaching the question whether the city had violated Collins' constitutional rights, the Court of Appeals affirmed on the theory that there had been no "abuse of governmental power," which the court found to be a necessary element of a § 1983 action.

Held: Because a city's customary failure to train or warn its employees about known hazards in the workplace does not violate the Due Process Clause, § 1983 does not provide a remedy for a municipal employee who is fatally injured in the course of his employment as a result of the city's failure. Pp. 119–130.

(a) This Court's cases do not support the Court of Appeals' reading of § 1983 as requiring an abuse of governmental power separate and apart from the proof of a constitutional violation. Contrary to that court's analysis, neither the fact that Collins was a government employee nor the characterization of the city's deliberate indifference to his safety as something other than an "abuse of governmental power" is a sufficient reason for refusing to entertain petitioner's federal claim under § 1983. Proper analysis requires that two issues be separated when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation. Pp. 119–120.

(b) It is assumed for the purpose of decision that the complaint's use of the term "deliberate indifference" to characterize the city's failure to

Syllabus

train its sanitation department employees is sufficient to hold the city responsible if the complaint has also alleged a constitutional violation. See *Canton* v. *Harris*, 489 U. S. 378. Pp. 120–124.

(c) The complaint has not alleged a constitutional violation. Neither the Due Process Clause's text—which, *inter alia*, guarantees due process in connection with any deprivation of liberty by a State—nor its history supports petitioner's unprecedented claim that the Clause imposes an independent substantive duty upon municipalities to provide certain minimal levels of safety and security in the workplace. Although the "process" that the Clause guarantees includes a continuing obligation to satisfy certain minimal custodial standards for those who have already been deprived of their liberty, petitioner cannot maintain that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an employment offer. Also unpersuasive is petitioner's claim that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical tort claim under state law, which is not supplanted by the Due Process Clause, see, *e. g.*, *Daniels* v. *Williams*, 474 U. S. 327, 332–333, particularly in the area of public employment, see, *e. g.*, *Bishop* v. *Wood*, 426 U. S. 341, 350. In light of the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing forces, decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as employee training, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the country's basic charter of Government. For the same reasons, petitioner's suggestion that the Texas Hazard Communication Act supports her substantive due process claim is rejected. Pp. 125–130.

916 F. 2d 284, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Sanford Jay Rosen argued the cause for petitioner. With him on the briefs were *Don Busby* and *Andrea G. Asaro.*

Lucas A. Powe, Jr., argued the cause for respondent. With him on the brief were *Roy L. Barrett* and *Stuart Smith.**

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether § 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U. S. C. § 1983, provides a remedy for a municipal employee who is fatally injured in the course of his employment because the city customarily failed to train or warn its employees about known hazards in the workplace. Even though the city's conduct may be actionable under state law, we hold that § 1983 does not apply because such conduct does not violate the Due Process Clause.

On October 21, 1988, Larry Michael Collins, an employee in the sanitation department of the city of Harker Heights, Texas, died of asphyxia after entering a manhole to unstop a sewer line. Petitioner, his widow, brought this action alleging that Collins "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." App. 7. Her complaint alleged that the city violated that right by following a custom and policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at jobsites, and not providing safety warnings. The complaint also alleged that a prior incident

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Edward Tuddenham, J. Patrick Wiseman, Steven R. Shapiro, John A. Powell,* and *Helen Hershkoff;* for the Association of Trial Lawyers of America by *Jeffrey L. Needle;* and for the National Education Association by *Robert H. Chanin* and *Jeremiah A. Collins.*

Richard Ruda, Carter G. Phillips, and *Mark D. Hopson* filed a brief for the National League of Cities et al. as *amici curiae* urging affirmance.

had given the city notice of the risks of entering the sewer lines[1] and that the city had systematically and intentionally failed to provide the equipment and training required by a Texas statute. *Ibid.* The District Court dismissed the complaint on the ground that a constitutional violation had not been alleged. No. W–89–CA–168 (WD Tex., Oct. 30, 1988), App. 20. The Court of Appeals for the Fifth Circuit affirmed on a different theory. 916 F. 2d 284 (1990). It did not reach the question whether the city had violated Collins' constitutional rights because it denied recovery on the ground that there had been no "abuse of governmental power," which the Fifth Circuit had found to be a necessary element of a § 1983 action.[2] *Id.*, at 287–288, and n. 3.

---

[1] In particular, the complaint alleged that "[p]rior to October, 1988, the City of Harker Heights was on notice of the dangers to which the employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months before Larry Michael Collins began work at the City of Harker Heights." App. 7.

[2] The Court of Appeals explained:

"The question presented in this case is whether a plaintiff seeking recovery under § 1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government—in its capacity as employer rather than as a governing authority—that deprives its employee of an alleged constitutional right give rise to a § 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard. The district court appears to have merged those two standards, which are among those necessary for bringing § 1983 into play here. In reviewing this Rule 12(b)(6) dismissal, we will keep them separate.

. . . . .

"In this Circuit, there is a separate standard that must also be satisfied—an abuse of government power. While this element is in many ways similar to, and often blends with, other necessary elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless." 916 F. 2d, at 286–287.

The contrary decision in *Ruge* v. *Bellevue*, 892 F. 2d 738 (CA8 1989), together with our concern about the Court of Appeals' interpretation of the statute, prompted our grant of certiorari, 499 U. S. 958 (1991).

I

Our cases do not support the Court of Appeals' reading of § 1983 as requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation. Although the statute provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law, see, *e. g.*, *Martinez* v. *California*, 444 U. S. 277 (1980); *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189 (1989). More importantly, the statute does not draw any distinction between abusive and nonabusive federal violations.

The Court of Appeals' analysis rests largely on the fact that the city had, through allegedly tortious conduct, harmed one of its employees rather than an ordinary citizen over whom it exercised governmental power. The employment relationship, however, is not of controlling significance. On the one hand, if the city had pursued a policy of equally deliberate indifference to the safety of pedestrians that resulted in a fatal injury to one who inadvertently stepped into an open manhole, the Court of Appeals' holding would not speak to this situation at all, although it would seem that a claim by such a pedestrian should be analyzed in a similar manner as the claim by this petitioner. On the other hand, a logical application of the holding might also bar potentially meritorious claims by employees if, for example, the city had given an employee a particularly dangerous assignment in retaliation for a political speech, cf. *St. Louis* v. *Praprotnik*, 485 U. S. 112 (1988), or because of his or her gender, cf. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). The First Amendment, the Equal Protection and

Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections. Neither the fact that petitioner's decedent was a government employee nor the characterization of the city's deliberate indifference to his safety as something other than an "abuse of governmental power" is a sufficient reason for refusing to entertain petitioner's federal claim under § 1983.

Nevertheless, proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 817 (1985) (opinion of REHNQUIST, J.); *id.*, at 828–829 (opinion of Brennan, J., concurring in part and concurring in judgment). Because most of our opinions discussing municipal policy have involved the latter issue, it is appropriate to discuss it before considering the question whether petitioner's complaint has alleged a constitutional violation.

II

Section 1983 provides a remedy against "any person" who, under color of state law, deprives another of rights protected by the Constitution.[3] In *Monell*, the Court held that Congress intended municipalities and other local government entities to be included among those persons to whom § 1983 applies. 436 U. S., at 690. At the same time, the Court

---

[3] The section states, in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U. S. C. § 1983.

made it clear that municipalities may not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.*, at 691.[4] The Court emphasized that

> "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.
>
> . . . . .
>
> "[T]herefore, . . . a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, at 691, 694 (emphasis in original).

In a series of later cases, the Court has considered whether an alleged injury caused by municipal employees acting under color of state law provided a proper basis for imposing liability on a city. In each of those cases the Court assumed that a constitutional violation had been adequately alleged or proved and focused its attention on the separate issue of municipal liability. Thus, for example, in *Oklahoma City* v. *Tuttle*, *supra*, it was assumed that a police officer had violated the decedent's constitutional rights, but we held that the wrongful conduct of a single officer without any policymaking authority did not establish municipal policy. And in *St. Louis* v. *Praprotnik*, 485 U. S. 112 (1988), without reach-

---

[4] Petitioners in *Monell*, a class of female employees of the New York City Department of Social Services and Board of Education, alleged that the board and department violated their due process rights by implementing an official policy that compelled pregnant employees to take unpaid leaves of absences before such leaves were required for medical reasons. 436 U. S., at 660–661.

ing the question whether the adverse employment action taken against the plaintiff violated his First Amendment rights, the Court concluded that decisions by subordinate employees did not necessarily reflect official policy. On the other hand, in *Pembaur* v. *Cincinnati*, 475 U. S. 469 (1986), the Court held that a county was responsible for unconstitutional actions taken pursuant to decisions made by the county prosecutor and the county sheriff because they were the "officials responsible for establishing final policy with respect to the subject matter in question," *id.*, at 483–484.

Our purpose in citing these cases is to emphasize the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred. It was necessary to analyze whether execution of a municipal policy inflicted the injury in these cases because, unlike ordinary tort litigation, the doctrine of *respondeat superior* was inapplicable. The city is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can be fairly said that the city itself is the wrongdoer. Because petitioner in this case relies so heavily on our reasoning in *Canton* v. *Harris*, 489 U. S. 378 (1989)—and in doing so, seems to assume that the case dealt with the constitutional issue—it is appropriate to comment specifically on that case.

In *Canton* we held that a municipality can, in some circumstances, be held liable under § 1983 "for constitutional violations resulting from its failure to train municipal employees." *Id.*, at 380. Among the claims advanced by the plaintiff in that case was a violation of the "right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody." *Id.*, at 381.[5] Because we assumed, *arguendo*, that the plain-

[5] "At the close of the evidence, the District Court submitted the case to the jury, which rejected all of Mrs. Harris' claims except one: her § 1983 claim against the city resulting from its *failure to provide her with medi-*

tiff's constitutional right to receive medical care had been denied, *id.*, at 388–389, n. 8, our opinion addressed only the question whether the constitutional deprivation was attributable to a municipal policy or custom.

We began our analysis by plainly indicating that we were not deciding the constitutional issue.

> "In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), we decided that a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983. *Id.*, at 694–695. 'It is only when the "execution of the government's policy or custom . . . inflicts the injury" that the municipality may be held liable under § 1983.' *Springfield* v. *Kibbe*, 480 U. S. 257, 267 (1987) (O'CONNOR, J., dissenting) (quoting *Monell*, *supra*, at 694).
>
> "Thus, our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id.*, at 385.

We did not suggest that all harm-causing municipal policies are actionable under § 1983 or that all such policies are unconstitutional. Moreover, we rejected the city's argument that only unconstitutional policies can create municipal liability under the statute. *Id.*, at 387. Instead, we concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. In particular, we held that the inadequate training of police officers could be characterized as the cause of the constitutional tort if—and only if—the

---

cal treatment while in custody." Canton v. *Harris*, 489 U. S., at 382 (emphasis added).

failure to train amounted to "deliberate indifference" to the rights of persons with whom the police come into contact. *Id.*, at 388.[6]

Although the term "deliberate indifference" has been used in other contexts to define the threshold for finding a violation of the Eighth Amendment, see *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976), as we have explained, that term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.[7] In this case, petitioner has used that term to characterize the city's failure to train the employees in its sanitation department. We assume for the purpose of decision that the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents, but that assumption does not confront the question whether the complaint has alleged a constitutional violation. To that question we now turn.

---

[6] We added:

"Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983.

. . . . .

"Consequently, while claims such as respondent's—alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." *Id.*, at 389, 392.

[7] Indeed, we expressly stated: "The 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." *Id.*, at 388, n. 8.

III

Petitioner's constitutional claim rests entirely on the Due Process Clause of the Fourteenth Amendment.[8] The most familiar office of that Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State. Petitioner, however, does not advance a procedural due process claim in this case. Instead, she relies on the substantive component of the Clause that protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986).

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 225–226 (1985). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive her husband of that right.

A fair reading of petitioner's complaint does not charge the city with a willful violation of Collins' rights. Petitioner does not claim that the city or any of its agents deliberately harmed her husband. In fact, she does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured. Instead, she makes the more general allegation that the city deprived him of

---

[8] The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

life and liberty by failing to provide a reasonably safe work environment.[9] Fairly analyzed, her claim advances two theories: that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's "deliberate indifference" to Collins' safety was arbitrary government action that must "shock the conscience" of federal judges. Cf. *Rochin* v. *California*, 342 U. S. 165, 172 (1952).

Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. "[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S., at 196 (quoting *Davidson* v. *Cannon*, 474 U. S. 344, 348 (1986)). As we recognized in *DeShaney:*

> "The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such

---

[9] Petitioner alleges that her husband had "a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." App. 7. The city's policy and custom of not training its employees and not warning them of the danger allegedly caused Collins' death and thus deprived him of those rights. *Id.*, at 8.

an expansive reading of the constitutional text." 489 U. S., at 195.[10]

Petitioner's submission that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented. It is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty. We have held, for example, that apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, cf. *Hutto* v. *Finney*, 437 U. S. 678 (1978), the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, see *Bell* v. *Wolfish*, 441 U. S. 520, 535, n. 16, 545 (1979), for persons in mental institutions, *Youngberg* v. *Romeo*, 457 U. S. 307, 315–316 (1982), for convicted felons, *Turner* v. *Safley*, 482 U. S. 78, 94–99 (1987), and for persons under arrest, see *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244–245 (1983). The "process" that the Constitution guarantees in

---

[10] "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. *E. g., Davidson* v. *New Orleans*, 96 U. S. 97 (1878) (assessment of real estate); *Rochin* v. *California*, 342 U. S. 165 (1952) (stomach pumping); *Bell* v. *Burson*, 402 U. S. 535 (1971) (suspension of driver's license); *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (paddling student); *Hudson* v. *Palmer*, 468 U. S. 517 (1984) (intentional destruction of inmate's property). No decision of this Court before *Parratt* [v. *Taylor*, 451 U. S. 527 (1981),] supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was 'intended to secure the individual from the arbitrary exercise of the powers of government,' *Hurtado* v. *California*, 110 U. S. 516, 527 (1884)." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986).

connection with any deprivation of liberty thus includes a continuing obligation to satisfy certain minimal custodial standards. See *DeShaney*, 489 U. S., at 200. Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment.

We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," *Daniels* v. *Williams*, 474 U. S., at 332, we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law, see, *e. g.*, *id.*, at 332–333; *Baker* v. *McCollan*, 443 U. S. 137, 146 (1979); *Paul* v. *Davis*, 424 U. S. 693, 701 (1976). The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship. See, *e. g.*, *Bishop* v. *Wood*, 426 U. S. 341, 350 (1976); *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577–578 (1972).

Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces. Cf. *Walker* v. *Rowe*, 791 F. 2d 507, 510 (CA7 1986). Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular as-

pects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause "is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop* v. *Wood*, 426 U. S., at 350. Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

Finally, we reject petitioner's suggestion that the Texas Hazard Communication Act[11] supports her substantive due process claim. We assume that the Act imposed a duty on the city to warn its sanitation employees about the dangers of noxious gases in the sewers and to provide safety training and protective equipment to minimize those dangers.[12] We also assume, as petitioner argues, that the Act created an entitlement that qualifies as a "liberty interest" protected by the Due Process Clause. But even with these assumptions, petitioner's claim must fail for she has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense. Cf. *Harrah Independent School Dist.* v.

---

[11] Tex. Rev. Civ. Stat. Ann., Art. 5182b (Vernon 1987).

[12] Section 10(a) of the Act states, for example:

"Every employer shall provide, at least annually, an education and training program for employees using or handling hazardous chemicals. . . . Additional instruction shall be provided when the potential for exposure to hazardous chemicals is altered or when new and significant information is received by the employer concerning the hazards of a chemical. New or newly assigned employees shall be provided training before working with or in a work area containing hazardous chemicals."

And § 15(a)states:

"Employees who may be exposed to hazardous chemicals shall be informed of the exposure and shall have access to the workplace chemical list and [material safety data sheets] for the hazardous chemicals. . . . In addition, employees shall receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act."

Martin, 440 U. S. 194, 198–199 (1979). The reasons why the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation of Collins' life, see *supra*, at 128–129, apply *a fortiori* to the less significant liberty interest created by the Texas statute.

In sum, we conclude that the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

Syllabus

WILLY *v.* COASTAL CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–1150. Argued December 3, 1991—Decided March 3, 1992

After petitioner Willy sued respondent Coastal Corporation in Texas state court, alleging that Coastal fired him for refusing to participate in its violation of federal and state environmental laws, Coastal removed the case to Federal District Court. That court rejected Willy's argument that it lacked subject-matter jurisdiction and dismissed the case for failure to state a claim. It also imposed sanctions against him, pursuant to Federal Rule of Civil Procedure 11, based on conduct in the case that was unrelated to petitioner's effort to convince the court that it lacked jurisdiction. The Court of Appeals concluded that the District Court lacked subject-matter jurisdiction, but upheld the court's decision to award sanctions and remanded the case for the court to determine the amount. On a second appeal, the Court of Appeals rejected Willy's argument that the District Court had no authority to impose sanctions in the absence of subject-matter jurisdiction.

Held: A court may impose Rule 11 sanctions in a case in which the district court is later determined to be without subject-matter jurisdiction. Pp. 134–139.

(a) While the expansive language of Rules 1 and 81(c) indicates a clear intent to have the Rules, including Rule 11, apply to all district court civil proceedings, the Rules must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III, see *Sibbach* v. *Wilson & Co.*, 312 U. S. 1. Pp. 134–135.

(b) The District Court's order in this case does not lie outside the range of action constitutionally permitted to an Article III court. Willy concedes that Congress has the power to regulate the courts and to authorize the imposition of sanctions. He errs in contending that Rule 11 sanctions must be aborted whenever it is determined that a court lacked jurisdiction at the time the objectionable conduct occurred. A court's concern with the maintenance of orderly procedure, even in the wake of a jurisdictional ruling later found to be mistaken, justifies the conclusion that the sanction here need not be upset. See, *e. g.*, *United States* v. *Mine Workers*, 330 U. S. 258. Because it deals with the issue whether the court's rules were violated, the instant order is collateral to the merits of the case. Thus, it implicates no constitutional concern because it does not deal with the court's assessment of the complaint's

legal merits, over which the court lacked jurisdiction. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384. And the District Court's interest in having rules of procedure obeyed did not disappear with the subsequent determination that it lacked subject-matter jurisdiction. *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U. S. 72, distinguished. Pp. 135–139.

915 F. 2d 965, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Michael A. Maness argued the cause and filed briefs for petitioner.

Michael L. Beatty argued the cause for respondents. With him on the brief were *Carter G. Phillips, Mark D. Hopson, Lawrence P. Ellsworth,* and *Robert C. DeMoss.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to decide whether a federal district court may impose sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure in a case in which the district court is later determined to be without subject-matter jurisdiction. 501 U. S. 1216 (1991). We conclude that in the circumstances presented here it may do so.

Petitioner Willy sued respondent Coastal Corporation (Coastal or respondent) in Texas state court, raising a variety of claims relating to Coastal's decision to terminate his employment as "in-house" counsel. Petitioner alleged that he had been fired due to his refusal to participate in respondent's violation of various federal and state environmental laws. Respondent removed the case to Federal District Court, claiming original federal-question jurisdiction under 28 U. S. C. §§ 1331, 1441. Petitioner objected to the removal, claiming that his case did not "arise under" federal law, see § 1331, but the District Court disagreed and concluded that it had subject-matter jurisdiction. The District Court subsequently granted respondent's motion to dismiss for failure to

state a claim, Fed. Rule Civ. Proc. 12(b)(6), and dismissed petitioner's pendent state claims.

At the same time, the District Court granted respondent's motion for Rule 11 sanctions, awarding attorney's fees of $22,625 against Willy and his attorney, Young, jointly and severally. The District Court found that the filings made by plaintiff's counsel "create[d] a blur of absolute confusion." App. to Pet. for Cert. A–7. These included a 1,200-page, unindexed, unnumbered pile of materials that the District Court determined "to be a conscious and wanton affront to the judicial process, this Court, and opposing counsel" that was "irresponsible at a minimum and at worst intentionally harassing." *Ibid.* Petitioner's sanctionable behavior also included careless pleading, such as reliance on a nonexistent Federal Rule of Evidence. *Ibid.* None of the sanctionable conduct was related to petitioner's initial effort to convince the District Court that it was without subject-matter jurisdiction.

On appeal, the Court of Appeals for the Fifth Circuit concluded that the District Court had lacked subject-matter jurisdiction because the complaint raised no claims arising under federal law. 855 F. 2d 1160 (1988). It therefore reversed the District Court order dismissing the claims and instructed that the case be remanded to state court. The court also upheld the District Court's decision to award Rule 11 sanctions, although it remanded the case to the District Court to determine the amount. On remand the District Court recomputed the Rule 11 sanctions and imposed sanctions in the amount of $19,307, the amount of attorney's fees that respondent had incurred in responding to petitioner's sanctionable conduct. The Court of Appeals affirmed. 915 F. 2d 965 (CA5 1990).

On this second appeal, the Court of Appeals rejected petitioner's contention that, in the absence of subject-matter jurisdiction, the District Court was constitutionally without

authority to impose Rule 11 sanctions. It concluded that the authority to impose Rule 11 sanctions rested in the "inherent powers" of the federal courts—those powers "'necessary to the exercise of all others.'" *Id.*, at 966 (quoting *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 764 (1980)). The court concluded that the exercise of Rule 11 powers was an example of such inherent powers. It principally relied on our recent decision in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384 (1990), in which we upheld a Rule 11 sanction imposed for filing a frivolous complaint even though the sanction order was entered after the plaintiff voluntarily dismissed its suit.

Before this Court, petitioner advances two claims. The first is that Congress, in acquiescing in the adoption of the Federal Rules of Civil Procedure, did not "authoriz[e] recovery of fees or costs against parties who prevail on jurisdictional grounds." Brief for Petitioner 18. Petitioner finds in both the Rules Enabling Act and the Rules the "implicit premise . . . that rules of practice and procedure are not necessary for disputes beyond the judicial power conferred by Article III." *Id.*, at 28. Phrased this way, the petitioner's contention is correct, but it does not dispose of this case.

The Rules Enabling Act, 28 U. S. C. § 2072, authorizes the Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . ." Those rules may not "abridge, enlarge or modify any substantive right." In response, we have adopted the Federal Rules of Civil Procedure. Rule 1 governs their scope. It provides that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature . . . ." Rule 81(c) specifically provides that the Rules "apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal." This expansive language contains no express ex-

ceptions and indicates a clear intent to have the Rules, including Rule 11, apply to all district court civil proceedings.[1]

But in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941), we observed that federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute. *Id.*, at 10. Such a caveat applies *a fortiori* to any effort to extend by rule the judicial power of the United States described in Article III of the Constitution. The Rules, then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III. We must therefore examine petitioner's second, and related contention, that the District Court action in this case lies outside the range of action constitutionally permitted to an Article III court.

Petitioner begins by pointing out that Article III limits the subject-matter jurisdiction of the federal courts to certain "cases or controversies." Brief for Petitioner 11. He then contends that the District Court's exercise of judicial power to grant Rule 11 sanctions must have been an unconstitutional act because, in the absence of subject-matter ju-

---

[1] Rule 11 requires that every paper filed with the District Court be signed by an attorney or by the party. The signature constitutes a certificate by the signer that

"to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

A pleading determined to be in contravention of the Rule subjects both the signer and the party he represents to "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." *Ibid.* We take as given that the District Court correctly determined that petitioner's filings were insufficiently well grounded to satisfy the Rule, the payment of attorney's fees was a reasonable sanction in response, and the imposition of joint and several liability was appropriate.

risdiction, the district court lacks "a substantive source of judicial power, beyond that conferred by Article III." *Id.*, at 18. Thus, according to petitioner, even had Congress attempted to grant the courts authority to impose sanctions in a case such as this, the grant would run afoul of Article III.

In making this claim, petitioner acknowledges that there are some circumstances in which federal courts may impose attorney's fees or costs, even where the court eventually proves to be without subject-matter jurisdiction.[2] He contends, however, that such instances are limited to a narrowly prescribed category of cases and do not include the situation in which sanctions are imposed against a party who has successfully contested jurisdiction.

We think petitioner's contentions flawed in several respects. Article I, § 8, cl. 9, authorizes Congress to establish the lower federal courts. From almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws "necessary and proper"[3] to their establishment, also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced. See *Wayman* v. *Southard*, 10 Wheat. 1, 21–22 (1825); *Hanna* v. *Plumer*, 380 U. S. 460, 473 (1965) (describing "long-recognized power of Congress to prescribe housekeeping rules for federal courts"). Indeed, in acknowledging the many circumstances in which sanctions can be imposed, several of which have a statutory basis, petitioner effectively concedes both Congress' general power to regulate the courts and its specific

---

[2] See Brief for Petitioner 18, n. 14, acknowledging 28 U. S. C. § 1919 (authorizing "payment of just costs" in any action or suit dismissed for lack of jurisdiction) and 28 U. S. C. § 1447(c) (authorizing attorney's fees and costs for wrongful removal). See also Brief for Petitioner 22–27, admitting federal-court authority to exercise "inherent powers" to sanction through attorney's fees and costs or criminal contempt those who obstruct a court's effort to determine its jurisdiction.

[3] Art. I, § 8, cl. 18.

power to authorize the imposition of sanctions. See n. 2, *supra*.

This leaves only petitioner's contention that Rule 11 sanctions must be aborted because at a time after the sanctionable conduct occurred, it was determined by the Court of Appeals that the District Court lacked subject-matter jurisdiction. A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction. In *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940), we held that a judgment rendered in a case in which it was ultimately concluded that the District Court was without jurisdiction was nonetheless res judicata on collateral attack made by one of the parties. See also *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938). In *Stoll*, we observed that the practical concern with providing an end to litigation justifies a rule preventing collateral attack on subject-matter jurisdiction. *Id.*, at 172.

In *United States* v. *Mine Workers*, 330 U. S. 258 (1947), we upheld a criminal contempt citation even on the assumption that the District Court issuing the citation was without jurisdiction over the underlying action. In that case, the question was raised on direct review and not collateral attack. We think the same concern expressed in these cases—the maintenance of orderly procedure, even in the wake of a jurisdiction ruling later found to be mistaken—justifies the conclusion that the sanction ordered here need not be upset.

The District Court order which the petitioner seeks to upset is one that is collateral to the merits. We recently had occasion to examine Rule 11's scope and purpose in great detail in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384 (1990). The challenge in that case was to an order imposing Rule 11 sanctions for filing a frivolous complaint, entered

after the plaintiff had voluntarily dismissed his action. In the course of our discussion we noted that "[i]t is well established that a federal court may consider collateral issues after an action is no longer pending. . . . [An] imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Id.*, at 395–396. Such an order implicates no constitutional concern because it "does not signify a district court's assessment of the legal merits of the complaint." *Id.*, at 396. It therefore does not raise the issue of a district court adjudicating the merits of a "case or controversy" over which it lacks jurisdiction.

Petitioner places great weight on our decision in *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U. S. 72 (1988), a case involving a civil contempt order entered by the District Court. The contemnors, two nonparty witnesses, refused to comply with a District Court document subpoena. The District Court found them in civil contempt and ordered them to pay a fine of $50,000 per day. The contemnors, as was their right, immediately appealed the contempt order, challenging the District Court's subject-matter jurisdiction. We held that the Court of Appeals was obligated to consider the jurisdictional challenge in full, rather than simply contenting itself with an inquiry into whether the District Court colorably had jurisdiction. We further concluded that if the District Court was found to be lacking subject-matter jurisdiction, that the contempt order would also fall. Focusing on this second part of our decision, petitioner cites *Catholic Conference* as establishing the proposition that a sanction must fall if imposed when jurisdiction is in fact absent.[4]

Catholic Conference does not stand for such a broad assertion. A civil contempt order has much different purposes

[4] Petitioner does acknowledge certain limited exceptions, see n. 2, *supra*.

than a Rule 11 sanction. Civil contempt is designed to force the contemnor to comply with an order of the court, *id.*, at 79; Rule 11 is designed to punish a party who has already violated the court's rules. *Cooter & Gell, supra,* at 396. Given that civil contempt is designed to coerce compliance with the court's decree, it is logical that the order itself should fall with a showing that the court was without authority to enter the decree. Accord, *United States* v. *Mine Workers, supra.*

The interest in having rules of procedure obeyed, by contrast, does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction. Courts do make mistakes; in cases such as *Catholic Conference* it may be possible immediately to seek relief in an appellate tribunal. But where such an immediate appeal is not authorized, there is no constitutional infirmity under Article III in requiring those practicing before the courts to conduct themselves in compliance with the applicable procedural rules in the interim, and to allow the courts to impose Rule 11 sanctions in the event of their failure to do so.[5]

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

---

[5] Our conclusion that the District Court acted within the scope of the Federal Rules and that the sanction may constitutionally be applied even when subject-matter jurisdiction is eventually found lacking makes it unnecessary for us to consider respondent's alternative contention that the sanction may be upheld as an appropriate exercise of the District Court's "inherent powers."

Syllabus

McCARTHY *v.* MADIGAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90–6861. Argued December 9, 1991—Decided March 4, 1992

While a federal prisoner, petitioner McCarthy filed a damages action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that respondent prison officials had violated his Eighth Amendment rights by their deliberate indifference to his needs and medical condition resulting from a back operation and a history of psychiatric problems. The District Court dismissed his complaint on the ground that he had failed to exhaust the Federal Bureau of Prisons' administrative remedy procedure, which, *inter alia*, includes rapid filing and response timetables to promote efficient dispute resolution but does not provide for any kind of hearing or for the granting of any particular type of relief. The court then denied McCarthy's motion for reconsideration, rejecting his argument that exhaustion was not required because he sought only money damages, which the Bureau could not provide. The Court of Appeals affirmed.

Held: Exhaustion of the Bureau of Prisons' administrative procedure is not required before a federal prisoner can initiate a *Bivens* action solely for money damages. Pp. 144–156.

(a) Exhaustion serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency. Where Congress specifically mandates, exhaustion is required. Otherwise, the federal courts must exercise sound judicial discretion, determining whether to require exhaustion by balancing the individual's interest in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. Individual interests have weighed heavily where resort to the administrative remedy would occasion undue prejudice to subsequent assertion of a court action, where there is some doubt as to whether the agency is empowered to grant effective relief, or where the administrative body is shown to be biased or has otherwise predetermined the issue before it. Pp. 144–149.

(b) Congress has not required exhaustion of a federal prisoner's *Bivens* claim. And, given the type of claim McCarthy raises and the particular characteristics of the Bureau's general grievance procedure, McCarthy's individual interests outweigh countervailing institutional interests favoring exhaustion. The procedure's short, successive filing deadlines and the absence of any monetary remedy heavily burden a

petitioning inmate's individual interests. In contrast, while the Bureau has a substantial interest in encouraging internal resolution of grievances and in preventing the undermining of its authority by unnecessary resort of prisoners to the federal courts, other institutional concerns do not weigh heavily in favor of exhaustion. The Bureau's alleged failure to render medical care implicates only tangentially its authority to carry out the control and management of the federal prisons, and the Bureau does not bring to bear any special expertise on the type of issue presented for resolution here. Nor are the interests of judicial economy advanced substantially by the grievance procedure, which does not create a formal factual record of the type that can be relied on conclusively by a court for disposition of a prisoner's claim on the pleadings or at summary judgment without the aid of affidavits. Pp. 149–156.

914 F. 2d 1411, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which SCALIA and THOMAS, JJ., joined, *post*, p. 156.

Paul M. Smith argued the cause and filed briefs for petitioner.

Deputy Solicitor General Mahoney argued the cause for respondents. With her on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Amy L. Wax*, *Victor D. Stone*, and *William D. Braun*.

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether a federal prisoner must resort to the internal grievance procedure promulgated by the Federal Bureau of Prisons before he may initiate a suit, pursuant to the authority of *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), solely for money damages. The Court of Appeals for the Tenth Circuit ruled that exhaustion of the grievance procedure was required. 914 F. 2d 1411 (1990). We granted certiorari to resolve a conflict among the Courts of Appeals.[1] 499 U. S. 974 (1991).

[1] Compare *Hessbrook* v. *Lennon*, 777 F. 2d 999 (CA5 1985) (exhaustion required), and *Brice* v. *Day*, 604 F. 2d 664 (CA10 1979) (same), cert. denied, 444 U. S. 1086 (1980), with *Muhammad* v. *Carlson*, 739 F. 2d 122 (CA3

I

While he was a prisoner in the federal penitentiary at Leavenworth, petitioner John J. McCarthy filed a *pro se* complaint in the United States District Court for the District of Kansas against four prison employees: the hospital administrator, the chief psychologist, another psychologist, and a physician. McCarthy alleged that respondents had violated his constitutional rights under the Eighth Amendment by their deliberate indifference to his needs and medical condition resulting from a back operation and a history of psychiatric problems. On the first page of his complaint, he wrote: "This Complaint seeks Money Damages Only." App. 7.

The District Court dismissed the complaint on the ground that petitioner had failed to exhaust prison administrative remedies. *Id.*, at 12. Under 28 CFR pt. 542 (1991), setting forth the general "Administrative Remedy Procedure for Inmates" at federal correctional institutions, a prisoner may "seek formal review of a complaint which relates to any aspect of his imprisonment." § 542.10.[2] When an inmate files a complaint or appeal, the responsible officials are directed to acknowledge the filing with a "signed receipt" which is returned to the inmate, to "[c]onduct an investigation," and to "[r]espond to and sign all complaints or appeals." §§ 542.11(a)(2) to (4). The general grievance regulations do not provide for any kind of hearing or for the granting of any particular type of relief.

1984) (exhaustion not required), and *Goar* v. *Civiletti*, 688 F. 2d 27 (CA6 1982) (same).

[2] Certain categories of filings, however, "will not be accepted" under the general procedure. These include, among others, "tort claims." See 28 CFR § 542.12 (1991). The Bureau of Prisons has interpreted this "tort claims" exception to include claims under the Federal Tort Claims Act, but not constitutional claims for relief recognized under the *Bivens* case. Brief for Respondents 3, n. 1. Claims under the Federal Tort Claims Act are governed by a separate administrative procedure. See §§ 543.30 to 543.32.

To promote efficient dispute resolution, the procedure includes rapid filing and response timetables. An inmate first seeks informal resolution of his claim by consulting prison personnel. § 542.13(a). If this informal effort fails, the prisoner "may file a formal written complaint on the appropriate form, within fifteen (15) calendar days of the date on which the basis of the complaint occurred." § 542.13(b). Should the warden fail to respond to the inmate's satisfaction within 15 days, the inmate has 20 days to appeal to the Bureau's Regional Director, who has 30 days to respond. If the inmate still remains unsatisfied, he has 30 days to make a final appeal to the Bureau's general counsel, who has another 30 days to respond. §§ 542.14 and 542.15. If the inmate can demonstrate a "valid reason for delay," he "shall be allowed" an extension of any of these time periods for filing. § 542.13(b).

Petitioner McCarthy filed with the District Court a motion for reconsideration under Federal Rule of Civil Procedure 60(b), arguing that he was not required to exhaust his administrative remedies, because he sought only money damages which, he claimed, the Bureau could not provide.[3] 1 Record, Exh. 7. The court denied the motion. App. 14.

The Court of Appeals, in affirming, observed that because *Bivens* actions are a creation of the judiciary, the courts may impose reasonable conditions upon their filing. 914 F. 2d, at 1412. The exhaustion rule, the court reasoned, "is not keyed to the type of relief sought, but to the need for prelim-

---

[3] McCarthy actually had initiated a grievance prior to filing his complaint in the District Court. Brief for Petitioner 5, n. 7. But he did not exhaust the procedures at that time and, in any event, he concedes that that grievance related to his request for a private cell and not to the medical issues at the heart of his federal complaint. After his initial grievance was dismissed, he filed a grievance with respect to the medical issues. It was accepted, even though it was late, but was denied by the warden on the merits. Tr. of Oral Arg. 38. McCarthy's subsequent appeal to the Bureau's regional office was rejected because it was filed late. *Id.*, at 16; Brief for Petitioner 5, n. 7.

inary fact-finding" to determine "whether there is a possible *Bivens* cause of action." *Ibid.* Accordingly, "'[a]lthough the administrative apparatus could not award money damages . . . , administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the *extent* of the damages.'" *Ibid.*, quoting *Goar* v. *Civiletti*, 688 F. 2d 27, 29 (CA6 1982) (emphasis in original). Exhaustion of the general grievance procedure was required notwithstanding the fact that McCarthy's request was solely for money damages.

II

The doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal-court decisionmaking. Of "paramount importance" to any exhaustion inquiry is congressional intent. *Patsy* v. *Board of Regents of Florida*, 457 U. S. 496, 501 (1982). Where Congress specifically mandates, exhaustion is required. *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S. 561, 579 (1989); *Patsy*, 457 U. S., at 502, n. 4. But where Congress has not clearly required exhaustion, sound judicial discretion governs. *McGee* v. *United States*, 402 U. S. 479, 483, n. 6 (1971). See also *Patsy*, 457 U. S., at 518 (WHITE, J., concurring in part) ("[E]xhaustion is 'a rule of judicial administration,' . . . and unless Congress directs otherwise, rightfully subject to crafting by judges"). Nevertheless, even in this field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme. *Id.*, at 501–502, and n. 4.

A

This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before

seeking relief from the federal courts. See, *e. g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51, and n. 9 (1938) (discussing cases as far back as 1898). Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.

As to the first of these purposes, the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise. *McKart* v. *United States*, 395 U. S. 185, 194 (1969). See also *Bowen* v. *City of New York*, 476 U. S. 467, 484 (1986). The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court. Correlatively, exhaustion principles apply with special force when "frequent and deliberate flouting of administrative processes" could weaken an agency's effectiveness by encouraging disregard of its procedures. *McKart* v. *United States*, 395 U. S., at 195.

As to the second of the purposes, exhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. See, *e. g.*, *Parisi* v. *Davidson*, 405 U. S. 34, 37 (1972); *McKart* v. *United States*, 395 U. S., at 195. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context. See, *e. g.*, *Weinberger*

v. *Salfi*, 422 U. S. 749, 765 (1975) (exhaustion may allow agency "to compile a record which is adequate for judicial review").

B

Notwithstanding these substantial institutional interests, federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817–818 (1976). "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821). Accordingly, this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. "[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *West* v. *Bergland*, 611 F. 2d 710, 715 (CA8 1979), cert. denied, 449 U. S. 821 (1980). Application of this balancing principle is "intensely practical," *Bowen* v. *City of New York*, 476 U. S., at 484, citing *Mathews* v. *Eldridge*, 424 U. S. 319, 331, n. 11 (1976), because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.

C

This Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion

of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action. See *Gibson* v. *Berryhill*, 411 U. S. 564, 575, n. 14 (1973) (administrative remedy deemed inadequate "[m]ost often . . . because of delay by the agency"). See also *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S., at 587 ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker* v. *Southern R. Co.*, 385 U. S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 591–592 (1926) (claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief"). Even where the administrative decisionmaking schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim. *Bowen* v. *City of New York*, 476 U. S., at 483 (disability-benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them"); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 773 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required). By the same token, exhaustion principles apply with less force when an individual's failure to exhaust may preclude a defense to criminal liability. *Moore* v. *East Cleveland*, 431 U. S. 494, 497, n. 5 (1977) (plurality opinion); *McKart* v. *United States*, 395 U. S., at 197.

Second, an administrative remedy may be inadequate "because of some doubt as to whether the agency was empowered to grant effective relief." *Gibson* v. *Berryhill*, 411 U. S., at 575, n. 14. For example, an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the par-

ticular type of issue presented, such as the constitutionality of a statute. See, *e. g.*, *Moore* v. *East Cleveland*, 431 U. S., at 497, n. 5; *Mathews* v. *Diaz*, 426 U. S. 67, 76 (1976). In a similar vein, exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that "'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'" *Barry* v. *Barchi*, 443 U. S. 55, 63, n. 10 (1979) (quoting *Gibson* v. *Berryhill*, 411 U. S., at 575). Alternatively, an agency may be competent to adjudicate the issue presented, but still lack authority to grant the type of relief requested. *McNeese* v. *Board of Ed. for Community Unit School Dist. 187*, 373 U. S. 668, 675 (1963) (students seeking to integrate public school need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit); *Montana National Bank of Billings* v. *Yellowstone County*, 276 U. S. 499, 505 (1928) (taxpayer seeking refund not required to exhaust where "any such application [would have been] utterly futile since the county board of equalization was powerless to grant any appropriate relief" in face of prior controlling court decision).

Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it. *Gibson* v. *Berryhill*, 411 U. S., at 575, n. 14; *Houghton* v. *Shafer*, 392 U. S. 639, 640 (1968) (in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act"); *Association of National Advertisers, Inc.* v. *FTC*, 201 U. S. App. D. C. 165, 170–171, 627 F. 2d 1151, 1156–1157 (1979) (bias of Federal Trade Commission chairman), cert. denied, 447 U. S. 921 (1980). See also *Patsy* v. *Florida International University*,

634 F. 2d 900, 912–913 (CA5 1981) (en banc) (administrative procedures must "not be used to harass or otherwise discourage those with legitimate claims"), rev'd on other grounds *sub nom. Patsy* v. *Board of Regents of Florida*, 457 U. S. 496 (1982).

III

In light of these general principles, we conclude that petitioner McCarthy need not have exhausted his constitutional claim for money damages. As a preliminary matter, we find that Congress has not meaningfully addressed the appropriateness of requiring exhaustion in this context. Although respondents' interests are significant, we are left with a firm conviction that, given the type of claim McCarthy raises and the particular characteristics of the Bureau's general grievance procedure, McCarthy's individual interests outweigh countervailing institutional interests favoring exhaustion.

A

Turning first to congressional intent, we note that the general grievance procedure was neither enacted nor mandated by Congress. Respondents, however, urge that Congress, in effect, has acted to require exhaustion by delegating power to the Attorney General and the Bureau of Prisons to control and manage the federal prison system. See 18 U. S. C. §§ 4001(b) and 4042. Brief for Respondents 3, 16; Tr. of Oral Arg. 41–42. We think respondents confuse what Congress could be claimed to allow by implication with what Congress affirmatively has requested or required. By delegating authority, in the most general of terms, to the Bureau to administer the federal prison system, Congress cannot be said to have spoken to the particular issue whether prisoners in the custody of the Bureau should have direct access to the federal courts.

Respondents next argue that Congress, by enactment of § 7 of the Civil Rights of Institutionalized Persons Act, 94 Stat. 352, 42 U. S. C. § 1997e, has articulated a policy favoring

exhaustion of the prison grievance procedure prior to the filing of a constitutional claim against prison officials. Section 1997e imposes a limited exhaustion requirement for a claim brought by a state prisoner under Rev. Stat. § 1979, 42 U. S. C. § 1983, provided that the underlying state prison administrative remedy meets specified standards. See *Patsy* v. *Board of Regents of Florida*, 457 U. S., at 507–512. Section 1997e has no direct application in this case, because at issue here is a *Bivens* claim by a *federal* prisoner against federal prison officials. We find it significant that Congress, in enacting § 1997e, stopped short of imposing a parallel requirement in the federal prison context.

Section 1997e is not only inapplicable to *Bivens* claims, but—by its own terms—cuts against respondents' claim that the particular procedure now at issue need be exhausted. First, unlike the rule of exhaustion proposed here, § 1997e does not authorize dismissal of an action for failure to exhaust. Instead, it provides that the action is to be stayed for a maximum of 90 days. See § 1997e(a)(1). Second, § 1997e does not mechanically require exhaustion in every case where an acceptable state procedure is in place. Rather, it directs federal courts to abstain "if the court believes that such a [waiting] requirement would be appropriate and in the interests of justice." § 1997e(a)(1). In other words, if an inmate fails to meet filing deadlines under an administrative scheme, a court has ample discretion to determine that exhaustion nonetheless should be forgone. Third, in contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, the statute conditions exhaustion on the existence of "effective administrative remedies."[4] It is diffi-

[4] The Conference Committee Report states: "It is the intent of the Congress that the court not find such a requirement [of exhaustion] appropriate in those situations in which the action brought . . . raises issues

cult to see why a stricter rule of exhaustion than Congress itself has required in the state prison context should apply in the federal prison context.

Respondents also argue that requiring exhaustion is appropriate because *Bivens* relief gives way when necessary to accommodate either the effective functioning of Government or an articulated congressional policy. Brief for Respondents 15. We have recognized that a *Bivens* remedy does not lie in two situations: (1) where Congress has provided an equally effective alternative remedy and declared it to be a substitute for recovery under the Constitution, and (2) where, in the absence of affirmative action by Congress, special factors counsel hesitation. *Carlson* v. *Green*, 446 U. S. 14, 18–19 (1980). As to the first exception, Congress did not create the remedial scheme at issue here and that scheme, in any case, as noted above, cannot be considered to be equally effective with respect to a claim for money damages. As to the second exception, respondents appear to confuse the presence of *special* factors with *any* factors counseling hesitation. In *Carlson*, the Court held that "special factors" do not free prison officials from *Bivens* liability, because prison officials do not enjoy an independent status in our constitutional scheme, nor are they likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim. *Carlson* v. *Green*, 446 U. S., at 19.

Interpreting the "special factors" exception in *Schweiker* v. *Chilicky*, 487 U. S. 412 (1988), and in *Bush* v. *Lucas*, 462

---

which cannot, in reasonable probability, be resolved by the grievance resolution system . . . ." H. R. Conf. Rep. No. 96–897, p. 15 (1980).

The Attorney General, charged under the statute with certifying the adequacy of state administrative remedial schemes, has provided by regulation: "The [state] grievance procedure shall afford a successful grievant *a meaningful remedy*." 28 CFR §40.6 (1991) (emphasis added). At the time of promulgating these regulations, the Department of Justice observed on the public record: "Presumably, where monetary relief was the sole adequate remedy and could not be obtained through a grievance procedure, exhaustion would not be appropriate." 46 Fed. Reg. 3845 (1981).

U. S. 367 (1983), the Court found the *Bivens* remedy displaced because Congress had legislated an elaborate and comprehensive remedial scheme. *Schweiker*, 487 U. S., at 425; *Bush*, 462 U. S., at 388. "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Schweiker*, 487 U. S., at 423. Here Congress has enacted nothing.

B

Because Congress has not *required* exhaustion of a federal prisoner's *Bivens* claim, we turn to an evaluation of the individual and institutional interests at stake in this case. The general grievance procedure heavily burdens the individual interests of the petitioning inmate in two ways. First, the procedure imposes short, successive filing deadlines that create a high risk of forfeiture of a claim for failure to comply. Second, the administrative "remedy" does not authorize an award of monetary damages—the only relief requested by McCarthy in this action. The combination of these features means that the prisoner seeking only money damages has everything to lose and nothing to gain from being required to exhaust his claim under the internal grievance procedure.

The filing deadlines for the grievance procedure require an inmate, within 15 days of the precipitating incident, not only to attempt to resolve his grievance informally but also to file a formal written complaint with the prison warden. 28 CFR § 542.13 (1991). Then, he must successively hurdle 20-day and 30-day deadlines to advance to the end of the grievance process. § 542.15. Other than the Bureau's general and quite proper interest in having early notice of any claim, we have not been apprised of any urgency or exigency justifying this timetable. Cf. *Yakus* v. *United States*, 321 U. S. 414, 435 (1944) ("The sixty days' period allowed for protest of the Administrator's regulations cannot be said to be

unreasonably short in view of the urgency and exigencies of wartime price regulation"). As a practical matter, the filing deadlines, of course, may pose little difficulty for the knowledgeable inmate accustomed to grievances and court actions. But they are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim.

Respondents argue that the deadlines are not jurisdictional and may be extended for any "valid" reason. See 28 CFR §§ 542.13(b) and 542.15 (1991). Yet the regulations do not elaborate upon what a "valid" reason is. Moreover, it appears that prison officials—perhaps the very officials subject to suit—are charged with determining what is a "valid" reason.

All in all, these deadlines require a good deal of an inmate at the peril of forfeiting his claim for money damages. The "first" of "the principles that necessarily frame our analysis of prisoners' constitutional claims" is that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner* v. *Safley*, 482 U. S. 78, 84 (1987). Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886). The rapid filing deadlines counsel strongly against exhaustion as a prerequisite to the filing of a federal-court action.[5]

---

[5] Petitioner concedes that if his complaint contained a prayer for injunctive relief, exhaustion principles would apply differently. Brief for Petitioner 20, n. 20. Were injunctive relief sought, the grievance procedure probably would be capable of producing the type of corrective action desired. Additionally, because of the continuing nature of conduct subject to injunctive relief, the short filing deadlines would pose less difficulty because the limitations period would be triggered anew by ongoing conduct.

As we have noted, the grievance procedure does not include any mention of the award of monetary relief. Respondents argue that this should not matter, because "in most cases there are other things that the inmate wants." Tr. of Oral Arg. 30. This may be true in some instances. But we cannot presume, as a general matter, that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, specifically requesting monetary compensation only, that he is likely interested in "other things." The Bureau, in any case, is always free to offer an inmate administrative relief in return for withdrawal of his lawsuit. We conclude that the absence of any monetary remedy in the grievance procedure also weighs heavily against imposing an exhaustion requirement.

In the alternative, respondents argue that, despite the absence of any provision in the general grievance procedure for the award of money damages, such damages in fact are available for most prisoners asserting *Bivens* claims. As to *Bivens* claims that could have been brought under the Federal Tort Claims Act (FTCA),[6] respondents contend that a grievance asking for money damages can be "converted" by prison officials to a FTCA claim for which prison officials are au-

[6] Respondents contend that *Bivens* claims are almost always categorizable as FTCA claims, especially in view of the Attorney General's concession that corrections guards are "law enforcement" officers within the meaning of the exception to the intentional-tort exception of the FTCA. Tr. of Oral Arg. 41. As to those claims that are not categorizable as FTCA claims, respondents concede that the Bureau of Prisons has no authority to offer a monetary settlement. *Id.*, at 40. Instead, they contend that the Department of Justice has a general settlement authority under the federal regulations that might be exercised to dispose of general grievance claims. 28 CFR § 50.15(c)(2) (1991). Nothing in the record indicates that this authority has ever been exercised to recompense a prisoner with a *Bivens* claim. Moreover, it is highly unlikely that a monetary settlement would be made in the course of an administrative proceeding, because the regulation provides that "[a]bsent exceptional circumstances" a monetary settlement will not be paid "before entry of an adverse verdict, judgment, or award." § 50.15(c)(3).

thorized, under 28 CFR § 543.30 (1991), to award money damages. This "conversion" authority does not appear in the regulations having to do with the grievance procedure, which raises substantial doubt that an inmate would have sufficient notice as to how his claim would be treated. In any event, respondents have not pointed to anything in the record showing that prison officials have a practice of converting a claim filed under the general grievance procedure to a claim under the FTCA procedure. We agree with petitioner that it is implausible to think that they do. The availability of a money damages remedy is, at best, uncertain, and the uncertainty of the administrative agency's authority to award relief counsels against requiring exhaustion. See *Hillsborough* v. *Cromwell*, 326 U. S. 620, 626 (1946); *Union Pacific R. Co.* v. *Board of Comm'rs of Weld County*, 247 U. S. 282, 287 (1918).

We do not find the interests of the Bureau of Prisons to weigh heavily in favor of exhaustion in view of the remedial scheme and particular claim presented here. To be sure, the Bureau has a substantial interest in encouraging internal resolution of grievances and in preventing the undermining of its authority by unnecessary resort by prisoners to the federal courts. But other institutional concerns relevant to exhaustion analysis appear to weigh in hardly at all. The Bureau's alleged failure to render medical care implicates only tangentially its authority to carry out the control and management of the federal prisons. Furthermore, the Bureau does not bring to bear any special expertise on the type of issue presented for resolution here.

The interests of judicial economy do not stand to be advanced substantially by the general grievance procedure. No formal factfindings are made. The paperwork generated by the grievance process might assist a court somewhat in ascertaining the facts underlying a prisoner's claim more quickly than if it has only a prisoner's complaint to review. But the grievance procedure does not create a formal factual

record of the type that can be relied on conclusively by a court for disposition of a prisoner's claim on the pleadings or at summary judgment without the aid of affidavits.

C

In conclusion, we are struck by the absence of supporting material in the regulations, the record, or the briefs that the general grievance procedure here was crafted with any thought toward the principles of exhaustion of claims for money damages. The Attorney General's professed concern for internal dispute resolution has not translated itself into a more effective grievance procedure that might encourage the filing of an administrative complaint as opposed to a court action. Congress, of course, is free to design or require an appropriate administrative procedure for a prisoner to exhaust his claim for money damages. Even without further action by Congress, we do not foreclose the possibility that the Bureau itself may adopt an appropriate administrative procedure consistent with congressional intent.

The judgment of the Court of Appeals is reversed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in the judgment.

I agree with the Court's holding that a federal prisoner need not exhaust the procedures promulgated by the Federal Bureau of Prisons. My view, however, is based entirely on the fact that the grievance procedure at issue does not provide for any award of monetary damages. As a result, in cases such as this one where prisoners seek monetary relief, the Bureau's administrative remedy furnishes no effective remedy at all, and it is therefore improper to impose an exhaustion requirement. See *McNeese* v. *Board of Ed. for Community Unit School Dist. 187*, 373 U. S. 668, 675 (1963); *Montana National Bank of Billings* v. *Yellowstone County*, 276 U. S. 499, 505 (1928).

Because I would base the decision on this ground, I do not join the Court's extensive discussion of the general principles of exhaustion, nor do I agree with the implication that those general principles apply without modification in the context of a *Bivens* claim. In particular, I disagree with the Court's reliance on the grievance procedure's filing deadlines as a basis for excusing exhaustion. As the majority observes, *ante*, at 146–147, we have previously refused to require exhaustion of administrative remedies where the administrative process subjects plaintiffs to unreasonable delay or to an indefinite timeframe for decision. See *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S. 561, 587 (1989); *Gibson* v. *Berryhill*, 411 U. S. 564, 575, n. 14 (1973); *Walker* v. *Southern R. Co.*, 385 U. S. 196, 198 (1966); *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 591–592 (1926). This principle rests on our belief that when a plaintiff might have to wait seemingly forever for an agency decision, agency procedures are "inadequate" and therefore need not be exhausted. *Coit Independence Joint Venture* v. *FSLIC*, *supra*, at 587.

But the Court makes strange use of this principle in holding that filing deadlines imposed by agency procedures may provide a basis for finding that those procedures need not be exhausted. *Ante*, at 152–153. Whereas before we have held that procedures without "reasonable time limit[s]" may be inadequate because they make a plaintiff wait too long, *Coit Independence Joint Venture* v. *FSLIC*, *supra*, at 587, today the majority concludes that strict filing deadlines might also contribute to a finding of inadequacy because they make a plaintiff move too quickly. But surely the second proposition does not follow from the first. In fact, short filing deadlines will almost always promote quick decisionmaking by an agency, the very result that we have advocated repeatedly in the cases cited above. So long as there is an escape clause, as there is here, and the time limit is within a

zone of reasonableness, as I believe it is here, the length of the period should not be a factor in deciding the adequacy of the remedy.

Syllabus

DAWSON *v.* DELAWARE

CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 90–6704. Argued November 12, 1991—Decided March 9, 1992

A Delaware jury convicted petitioner Dawson of first-degree murder and other crimes. At the penalty hearing, the prosecution, *inter alia*, read a stipulation—"[t]he Aryan Brotherhood refers to a white racist prison gang that began . . . in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware"—despite Dawson's assertion that the admission of the stipulated facts violated his First and Fourteenth Amendment rights, and introduced evidence that he had the words "Aryan Brotherhood" tattooed on his hand. The jury found that the aggravating circumstances—that the murder was committed by an escaped prisoner, during the commission of a burglary, and for pecuniary gain—outweighed Dawson's mitigating evidence—that he had shown kindness to family members and had earned good time credits in prison—and made a binding recommendation to the court that he be sentenced to death. The State Supreme Court affirmed.

Held:

1. Dawson's First and Fourteenth Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence had no relevance to the issues being decided in the proceeding. The Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment. See, *e. g.*, *Barclay* v. *Florida*, 463 U. S. 939. However, the narrowness of the stipulation admitted here left the evidence totally without relevance to the sentencing proceeding. The stipulation says nothing about the beliefs of the Delaware prison's chapter of the Aryan Brotherhood. Any racist beliefs the group might hold were not tied in any way to the murder, because Dawson's victim was white, as is Dawson. The evidence proved only the group's and Dawson's abstract beliefs, not that the group had committed or endorsed any unlawful or violent acts. Thus, it was not relevant to help prove any aggravating circumstance. Cf. *Texas* v. *Johnson*, 491 U. S. 397, 414. Nor was the evidence relevant to rebut any mitigating evidence, since, while the State was entitled to introduce "bad" character evidence to rebut Dawson's "good" character evidence, see *Payne* v. *Tennessee*, 501

U. S. 808, 825, the Aryan Brotherhood evidence cannot be viewed as relevant "bad" character evidence in its own right. Pp. 163–168.

2. The question whether the wrongful admission of the Aryan Brotherhood evidence was harmless error is left open for consideration by the State Supreme Court on remand. Pp. 168–169.

581 A. 2d 1078, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 169. THOMAS, J., filed a dissenting opinion, *post*, p. 169.

Bernard J. O'Donnell argued the cause for petitioner. With him on the briefs was *Brian J. Bartley.*

Richard E. Fairbanks, Jr., argued the cause for respondent. With him on the brief were *Charles M. Oberly III*, Attorney General of Delaware, and *Gary A. Myers* and *Loren C. Meyers*, Deputy Attorneys General.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding. We hold that they do.

Shortly after midnight on December 1, 1986, petitioner David Dawson and three other inmates escaped from the Delaware Correctional Center near Smyrna, Delaware. Dawson stole a car and headed south, while the other three inmates stole another car and drove north. Early that

---

**Michael A. Bamberger, Stuart Altschuler, John A. Powell, Steven R. Shapiro*, and *Jonathan Lang* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson, and *Robert A. Long, Jr.*, filed a brief for the United States as *amicus curiae* urging affirmance.

morning, Dawson burglarized a house near Kenton, Delaware, stealing a motorcycle jacket, several pocket watches, and containers of loose change. He then proceeded to the home of Richard and Madeline Kisner, located about half a mile from the burglary site. Mrs. Kisner was alone in the house, preparing to leave for work. Dawson brutally murdered Mrs. Kisner, stole the Kisners' car and some money, and fled further south.

He reappeared later that evening at the Zoo Bar in Milford, Delaware, wearing a motorcycle jacket that was too big for him. While at the bar, Dawson introduced himself to Patty Dennis, and told her that his name was "Abaddon," which he said meant "[o]ne of Satan's disciples." App. 80–81. Dawson was subsequently asked to leave the bar. Later that evening, a Delaware state police officer responded to a call to investigate a one-car accident. The car involved in the accident had been stolen from a location near the Zoo Bar and had been driven into a ditch, but the driver had left the scene. The police began a house-to-house search for Dawson, and found him at 5:25 the next morning, on the floor of a Cadillac parked about three-tenths of a mile from the accident site.

A jury convicted Dawson of first-degree murder, possession of a deadly weapon during the commission of a felony, and various other crimes. The trial court then conducted a penalty hearing before the jury to determine whether Dawson should be sentenced to death for the first-degree murder conviction. See Del. Code Ann., Tit. 11, § 4209 (1987). The prosecution gave notice that it intended to introduce (1) expert testimony regarding the origin and nature of the Aryan Brotherhood, as well as the fact that Dawson had the words "Aryan Brotherhood" tattooed on the back of his right hand, (2) testimony that Dawson referred to himself as "Abaddon" and had the name "Abaddon" tattooed in red letters across his stomach, and (3) photographs of multiple swastika tattoos on Dawson's back and a picture of a swastika he had painted

on the wall of his prison cell. Dawson argued that this evidence was inflammatory and irrelevant, and that its admission would violate his rights under the First and Fourteenth Amendments.

Before the penalty phase began, the parties agreed to a stipulation regarding the Aryan Brotherhood evidence. The stipulation provided:

> "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." App. 132.

In return for Dawson's agreement to the stipulation, the prosecution agreed not to call any expert witnesses to testify about the Aryan Brotherhood. Although Dawson agreed to the stipulation in order to avoid presentation of this expert testimony, it is apparent from the record and from the opinion of the Supreme Court of Delaware that he continued to assert that the admission of the stipulated facts into evidence violated the Constitution. 581 A. 2d 1078 (1990). At the penalty hearing, the prosecution read the stipulation to the jury and introduced evidence that Dawson had tattooed the words "Aryan Brotherhood" on his hand. The trial judge permitted the prosecution to present the evidence related to the name "Abaddon" as well, but excluded all of the swastika evidence. In addition, the prosecution submitted proof of Dawson's lengthy criminal record. Dawson, in turn, presented mitigating evidence based on the testimony of two family members and on the fact that he had earned good time credits in prison for enrolling in various drug and alcohol programs. The jury found three statutory aggravating circumstances, each making Dawson eligible for the death penalty under Delaware law; it determined (1) that the murder was committed by an escaped prisoner, (2) that the murder was committed during the commission of a burglary, and (3)

that the murder was committed for pecuniary gain. See *id.*, at 1102, and n. 27. The jury further concluded that the aggravating evidence outweighed the mitigating evidence, and recommended that Dawson be sentenced to death. The trial court, bound by that recommendation, imposed the death penalty.

The Supreme Court of Delaware affirmed the convictions and the death sentence. The court rejected Dawson's claim that the evidence concerning the Aryan Brotherhood and his use of the name "Abaddon" should have been excluded from the penalty hearing. It observed that having found at least one statutory aggravating factor, the jury was "required to make an *individualized* determination of whether Dawson should be executed or incarcerated for life, based upon Dawson's character, his record and the circumstances of the crime," and that it was desirable for the jury to have as much information before it as possible when making that decision. *Id.*, at 1102–1103 (emphasis in original). The court acknowledged that the Constitution would prohibit the consideration of certain irrelevant factors during the sentencing process, but stated that "'[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing . . . evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry.'" *Id.*, at 1103. Because the evidence relating to the Aryan Brotherhood and the name "Abaddon" properly focused the jury's attention on Dawson's character, and did not appeal to the jury's prejudices concerning race, religion, or political affiliation, the court upheld its introduction during the penalty phase. We granted certiorari, 499 U. S. 946 (1991), to consider whether the admission of this evidence was constitutional error. We hold that its admission in this case was error and so reverse.

We have held that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs. See *Aptheker* v. *Secretary of State*, 378

U. S. 500, 507 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958). Because his right to associate with the Aryan Brotherhood is constitutionally protected, Dawson argues, admission of evidence related to that association at his penalty hearing violated his constitutional rights. Relying on our statement in *Zant* v. *Stephens*, 462 U. S. 862 (1983), that an aggravating circumstance is invalid if "it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," he contends that the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment. *Id.*, at 885.

We think this submission is, in the light of our decided cases, too broad. These cases emphasize that "the sentencing authority has always been free to consider a wide range of relevant material." *Payne* v. *Tennessee*, 501 U. S. 808, 820–821 (1991); *United States* v. *Tucker*, 404 U. S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"); *Williams* v. *New York*, 337 U. S. 241 (1949). We have previously upheld the consideration, in a capital sentencing proceeding, of evidence of racial intolerance and subversive advocacy where such evidence was relevant to the issues involved. In *Barclay* v. *Florida*, 463 U. S. 939 (1983), for example, we held that a sentencing judge in a capital case might properly take into consideration "the elements of racial hatred" in Barclay's crime as well as "Barclay's desire to start a race war." See *id.*, at 949 (plurality opinion); *id.*, at 970, and n. 18 (STEVENS, J., concurring in judgment).

One year later, in *United States* v. *Abel*, 469 U. S. 45 (1984), we held that the Government could impeach a defense witness by showing that both the defendant and the witness were members of the Aryan Brotherhood, and that members were sworn to lie on behalf of each other. We held the evidence admissible to show bias, even assuming that member-

ship in the organization was among the associational freedoms protected by the First Amendment. Though *Abel* did not involve a capital sentencing proceeding, its logic is perfectly applicable to such a proceeding. We therefore conclude that the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Although we cannot accept Dawson's broad submission, we nevertheless agree with him that, in this case, the receipt into evidence of the stipulation regarding his membership in the Aryan Brotherhood was constitutional error. Before the penalty hearing, the prosecution claimed that its expert witness would show that the Aryan Brotherhood is a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates. If credible and otherwise admissible evidence to that effect had been presented, we would have a much different case. But, after reaching an agreement with Dawson, the prosecution limited its proof regarding the Aryan Brotherhood to the stipulation. The brief stipulation proved only that an Aryan Brotherhood prison gang originated in California in the 1960's, that it entertains white racist beliefs, and that a separate gang in the Delaware prison system calls itself the Aryan Brotherhood. We conclude that the narrowness of the stipulation left the Aryan Brotherhood evidence totally without relevance to Dawson's sentencing proceeding.

As an initial matter, the second sentence of the stipulation, when carefully parsed, says nothing about the beliefs of the Aryan Brotherhood "chapter" in the Delaware prisons. Prior to trial, the prosecution acknowledged that there are differences among the various offshoots of the Aryan Brotherhood, stating that "there are cells or specific off-shoots within various local jurisdictions that don't see eye to eye or share a union, if you will." App. 33. But the juxtaposition

of the second sentence with the first sentence, which describes the Aryan Brotherhood in California prisons as a "white racist prison gang," invited the jury to infer that the beliefs of the Delaware chapter are identical to those of the California chapter.

Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. In *Barclay*, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a "racial war," were related to the murder of a white hitchhiker. See 463 U. S., at 942–944 (plurality opinion). We concluded that it was most proper for the sentencing judge to "tak[e] into account the elements of racial hatred in this murder." *Id.*, at 949. In the present case, however, the murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing.

Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances. But the inference which the jury was invited to draw in this case tended to prove nothing more than the abstract beliefs of the Delaware chapter. Delaware counters that even these abstract beliefs constitute a portion of

Dawson's "character," and thus are admissible in their own right under Delaware law. Del. Code Ann., Tit. 11, § 4209(d) (1987). Whatever label is given to the evidence presented, however, we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs. Cf. *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson's part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible. Because Delaware failed to do more, we cannot find the evidence was properly admitted as relevant character evidence.

Nor was the Aryan Brotherhood evidence relevant to rebut any mitigating evidence offered by Dawson. We have held that a capital defendant is entitled to introduce any relevant mitigating evidence that he proffers in support of a sentence less than death. *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). But just as the defendant has the right to introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own. See *Payne* v. *Tennessee*, 501 U. S., at 825 ("[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in") (internal quotation marks omitted); *id.*, at 860 (STEVENS, J., dissenting). In this case, Dawson's mitigating evidence consisted of testimony about his kindness to family members, as well as evidence regarding good time credits he earned in prison for enrolling in various drug and alcohol programs. Delaware argues that because Dawson's evidence consisted of "good" character evidence, it was entitled to introduce any "bad" character

evidence in rebuttal, including that concerning the Aryan Brotherhood. The principle of broad rebuttal asserted by Delaware is correct, but the argument misses the mark because, as stated above, the Aryan Brotherhood evidence presented in this case cannot be viewed as relevant "bad" character evidence in its own right.

The dissent takes us to task for failing to recognize the broader implications of membership in a prison gang, and for extending the protection of the First Amendment to evidence introduced at a sentencing hearing. The material adduced by the dissent as to the nature of prison gangs—similar to the evidence which the prosecution in this case at one time considered adducing by expert testimony, *supra*, at 165—would, if it had been presented to the jury, have made this a different case. But we do not have the same confidence as the dissent does that jurors would be familiar with the court decisions and studies upon which it relies. Regarding the reach of the First Amendment, the dissent correctly points out that it prevents the State from criminalizing certain conduct in the first instance. But it goes further than that. It prohibits a State from denying admission to the bar on the grounds of previous membership in the Communist Party, when there is no connection between that membership and the "good moral character" required by the State to practice law. *Schware* v. *Board of Bar Examiners of N. M.*, 353 U. S. 232 (1957). It prohibits the State from requiring information from an organization that would impinge on First Amendment associational rights if there is no connection between the information sought and the State's interest. *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). We think that it similarly prevents Delaware here from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried.

The question whether the wrongful admission of the Aryan Brotherhood evidence at sentencing was harmless

error is not before us at this time, and we therefore leave it open for consideration by the Supreme Court of Delaware on remand. See *Clemons* v. *Mississippi*, 494 U. S. 738 (1990).

For the foregoing reasons, we vacate the judgment of the Supreme Court of Delaware and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but write separately to note my understanding that the Court, by the penultimate paragraph of its opinion, *ante*, at 168–169, does not *require* application of harmless-error review on remand.

This Court previously has declined to apply harmless-error analysis to certain categories of constitutional error. See, *e. g.*, *Batson* v. *Kentucky*, 476 U. S. 79, 100 (1986) (racial discrimination in the selection of a petit jury); *Vasquez* v. *Hillery*, 474 U. S. 254, 261–262 (1986) (racial discrimination in the selection of a grand jury); *Waller* v. *Georgia*, 467 U. S. 39, 49–50, and n. 9 (1984) (right to a public trial); *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927) (trial before an impartial judge). Because of the potential chilling effect that consideration of First Amendment activity at sentencing might have, there is a substantial argument that harmless-error analysis is not appropriate for the type of error before us today. See *Rose* v. *Clark*, 478 U. S. 570, 587 (1986) (STEVENS, J., concurring in judgment) ("[V]iolations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial"). The parties did not address this issue, and it is better left for the Supreme Court of Delaware on remand.

JUSTICE THOMAS, dissenting.

To rebut mitigating character evidence introduced by petitioner Dawson at his capital sentencing hearing, the State of Delaware proved that Dawson belonged to the Aryan Broth-

erhood prison gang. The Court holds that the gang membership evidence "ha[d] no relevance to the issues being decided in the proceeding" and that admission of the evidence violated the First Amendment. *Ante*, at 160. I respectfully dissent.

I

Dawson's membership in the Aryan Brotherhood prison gang had relevance at sentencing. Under Delaware law, after a jury finds a statutory aggravating factor, it may consider "all relevant evidence in aggravation or mitigation" relating to either the crime or the "character and propensities" of the defendant. Del. Code Ann., Tit. 11, § 4209(d)(1) (1987). Under this provision, Dawson's character became an issue in determining whether he should receive the death penalty.

To prove his good character, as the Court observes, Dawson introduced evidence that he had acted kindly toward his family and that he had earned good time credits while in prison. *Ante*, at 162. Dawson also introduced evidence of his membership and participation in various respectable organizations, including the Green Tree Program (described only as a "drug and alcohol program"), Alcoholics Anonymous (not described at all), and certain therapy and counseling groups (also not described at all). App. 79. Dawson did not call any expert witnesses to clarify the nature of these organizations or their activities.

The State attempted to rebut Dawson's mitigating character evidence in part by showing that Dawson also belonged to a prison gang called the Aryan Brotherhood. A stipulation read to the jury explained:

> "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." *Id.*, at 132.

I do not consider the evidence of Dawson's gang membership irrelevant to his character.

A

The Court asserts that the gang membership evidence had no relevance because it did nothing more than indicate Dawson's "abstract" racist "beliefs." *Ante*, at 167. The Court suggests that Dawson's membership in a prison gang would be relevant if the gang had endorsed or committed "unlawful or violent acts" such as drug use, escape, or the murder of other inmates. *Ante*, at 165, 166. Yet, because the State failed to prove the Aryan Brotherhood's activities, the Court reasons, the jury could do no more than infer that Dawson shared the gang's racist beliefs. *Ibid.* I disagree. In my judgment, a jury reasonably could conclude from Dawson's membership in a prison gang that he had engaged in some sort of forbidden activities while in prison. The evidence also tended to establish future dangerousness and to rebut Dawson's attempt to show that he was kind to others.

Jurors do not leave their knowledge of the world behind when they enter a courtroom and they do not need to have the obvious spelled out in painstaking detail. Just as defense counsel may assume when introducing mitigating evidence that a jury understands the nature of a church choir, a softball team, or the Boy Scouts, so too may a prosecutor assume when rebutting this evidence that a jury knows the nature of a prison gang. The concept of a prison gang is not so mysterious that it requires an encyclopedic definition or a greater explanation than any of the other organizations to which Dawson belonged, such as Alcoholics Anonymous or the Green Tree Program. Cf. *Jones* v. *Hamelman*, 869 F. 2d 1023, 1028 (CA7 1989) (testimony of a purported expert unnecessary to explain a prison gang once the record established its existence); United States Dept. of Justice, Prison Gangs: Their Extent, Nature and Impact on Prisons 10 (1985) (discussing the "extensive" media coverage of prison gangs).

In stating that Dawson belonged to a prison gang, the stipulation implied much more than that he shared the gang's abstract racist creed; it indicated that Dawson had engaged in prison gang activities, and that he had the character of a person who engages in these activities.

> "One of the distinguishing characteristics of the prison gang is the virtual absence of any non-criminal, non-deviant activities. Gang members engage in some institutional pastimes, weight lifting being one of the more notable, but in general their activities are criminal or deviant in nature. The gang member is completely immersed in being a career prison gangster, leaving little time and less inclination for other than asocial behavior." U. S. Dept. of Justice, *supra*, at x–xi.

Denying that Dawson's gang membership told the jury anything about his activities, tendencies, and traits—his "character"—ignores reality. What Judge Easterbrook remarked when others attempted to distinguish gang membership from gang activities, someone reading the Court's opinion might say today:

> "Who do they think they are fooling? What elements of 'membership'—as opposed to 'activity'—take place [in the prison]? What are prison gangs for, except to engage in forbidden 'activity'? Surely [they] do not believe that prison gangs meet every month to discuss *The Critique of Pure Reason* and debate how Stanley Tigerman's buildings differ from those of the Bauhaus school. Gangs affiliate for mutual support, but not the kind contemplated by the National Labor Relations Act." *David K.* v. *Lane*, 839 F. 2d 1265, 1278 (CA7 1988) (concurring opinion).

In my view, the stipulation was relevant to Dawson's character because it explained that the Aryan Brotherhood was a prison gang and that Dawson was a member. That evidence, I submit, supports an inference that while in prison,

Dawson engaged in the kind of unlawful activity mentioned by the Court.[1]

The description of the Aryan Brotherhood as a "racist" prison gang conveyed additional information about Dawson's character. In *Barclay* v. *Florida*, 463 U. S. 939 (1983), the plurality found it relevant that a black gang conspired not merely to commit crimes, but to commit them against white persons out of racial hatred. See *id.*, at 949. Even if Dawson's white racist prison gang does not advocate "the murder of fellow inmates," *ante*, at 165, a jury reasonably could infer that its members in one way or another act upon their racial prejudice. The stipulation itself makes clear that the Aryan Brotherhood does not exist merely to facilitate formulation of abstract racist thoughts, but to "respon[d]" to gangs of racial minorities. The evidence thus tends to establish that Dawson has not been "a well-behaved and well-adjusted prisoner," *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986), which

[1] Indeed, in the case of an organization claiming to be part of the Aryan Brotherhood, the jury very well may not have needed even the explanation that the stipulation provided. Courts regularly have noticed that the Aryan Brotherhood is "a singularly vicious prison gang," *United States* v. *Fountain*, 840 F. 2d 509, 516 (CA7 1988) (Easterbrook, J.) (citing other cases), that it has a "hostility to black inmates," *United States* v. *Silverstein*, 732 F. 2d 1338, 1341 (CA7 1984) (Posner, J.) (citing secondary sources), and that it originated "during the prison racial violence of the 1960's," *United States* v. *Mills*, 704 F. 2d 1553, 1555 (CA11 1983). The Aryan Brotherhood gangs also have received substantial attention in both popular and scholarly writings. See, *e. g.*, Matthee, Stronger Prison Gang Influence Cited, L. A. Times, July 10, 1987, part 1, p. 34, col. 1 (describing members of the Aryan Brotherhood as "among the most violent prisoners"); Goodgame, Mayhem in the Cellblocks, Time, Aug. 12, 1985, p. 20 (describing the Aryan Brotherhood's "inflexible ethic of vengeance"); J. Fox, Organizational and Racial Conflict in Maximum-Security Prisons 136 (1982) (identifying the Aryan Brotherhood as an "extremist" organization like the Ku Klux Klan); United States Dept. of Justice, Prison Gangs: Their Extent, Nature and Impact on Prisons 65–190 (1985) (discussing the activities of the Aryan Brotherhood in the prisons of 14 States). Even if the jury were unaware of the Aryan Brotherhood in particular, it was surely aware of the nature of prison gangs generally.

itself is an indication of future dangerousness, see *Franklin* v. *Lynaugh*, 487 U. S. 164, 178 (1988) (plurality opinion); *id.*, at 186 (O'CONNOR, J., concurring in judgment).

The stipulation also tends to rebut Dawson's evidence of good character. In capital cases, we have held that the sentence imposed should reflect a "'reasoned moral response'" not only to the crime, but also to the "'background'" and "'character'" of the defendant himself. See *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). In determining Dawson's "personal culpability," *Penry*, *supra*, at 327, the jury surely would want to know about the various activities, traits, and tendencies that distinguish him as a "uniquely individual human bein[g]," *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976). Dawson introduced mitigating character evidence that he had acted kindly towards his family. The stipulation tended to undercut this showing by suggesting that Dawson's kindness did not extend to members of other racial groups. Although we do not sit in judgment of the morality of particular creeds, we cannot bend traditional concepts of relevance to exempt the antisocial.

B

The Court's opinion suggests that the Constitution now imposes a double standard for determining relevance: a standard easy for defendants to satisfy, but difficult for prosecutors. Under *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion), a capital defendant has a right to introduce all relevant mitigating evidence. Capital defendants, as a result, regularly introduce character evidence that allows juries to consider their abstract beliefs and associational rights. Dawson, for example, introduced evidence that he associated with Alcoholics Anonymous and other groups. Other defendants have introduced comparable evidence regarding their religious practice and fraternal organizations. See, *e. g.*, *Jordan*

v. *State*, 518 So. 2d 1186, 1188 (Miss. 1987) (membership in a church); *Sivak* v. *State*, 112 Idaho 197, 236, 731 P. 2d 192, 231 (1986) (same); *Deputy* v. *State*, 500 A. 2d 581, 598 (Del. 1985) (religious rebirth); *People* v. *Belmontes*, 45 Cal. 3d 744, 797, 755 P. 2d 310, 340 (1988) (same); *Evans* v. *McCotter*, 790 F. 2d 1232, 1242, and n. 10 (CA5 1986) (conversion to Christianity); *State* v. *Beuke*, 38 Ohio St. 3d 29, 43, 526 N. E. 2d 274, 289 (1988) (former membership in the Cub Scouts). I see no way to hold that this evidence has relevance, but that Dawson's gang membership does not.

A double standard for determining relevance may distort the picture presented to the jury. In this case, Dawson himself chose to introduce evidence of certain good character traits. Unless the State had responded with evidence of other, bad traits, the jury could not possibly have made a fair and balanced determination. Membership in Alcoholics Anonymous might suggest a good character, but membership in the Aryan Brotherhood just as surely suggests a bad one. The jury could not have assessed Dawson's overall character without both.

Just last Term, in *Payne* v. *Tennessee*, 501 U. S. 808 (1991), the Court condemned a similar distortion. Overruling *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), we held that the Eighth Amendment does not generally prohibit the introduction of victim impact evidence. See *Payne*, *supra*, at 827. We reasoned that allowing the jury to consider the defendant, but not the victim, would create an unbalanced picture. Quoting a dissenting opinion in *Booth*, we stated: "'[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" *Payne*, *supra*, at 825 (quoting *Booth*, 482 U. S., at 517 (WHITE, J., dissenting)); see also 482 U. S., at 520

(SCALIA, J., dissenting) ("Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime . . . . Perhaps these sentiments do not sufficiently temper justice with mercy, but that is a question to be decided through the democratic processes of a free people, and not by the decrees of this Court"). Whatever distortion was produced in requiring an exclusive focus on the defendant's character, at least nothing in *Booth* prevented the jury—as does today's decision—from fairly and fully assessing that character.

II

The Court acknowledges that Delaware could have avoided any First Amendment problem simply by presenting evidence that proved something more than Dawson's abstract beliefs. *Ante*, at 167. For the reasons that I have stated, I believe that Delaware has made such a showing. I therefore see no First Amendment violation under the Court's analysis. The Court, however, goes on to make several further assertions about the First Amendment that I find troubling and unnecessary in this case.

A

Both Dawson and the State, as noted above, had a right to develop the issue of "character" at the sentencing proceeding. See Del. Code Ann., Tit. 11, § 4209(d)(1) (1987); *Eddings*, *supra*, at 113–114. In applying the First Amendment, however, the Court declines to decide whether abstract beliefs may constitute a portion of character. "Whatever label is given to the evidence," the Court asserts, "we conclude that Dawson's First Amendment rights were violated . . . in this case . . . ." *Ante*, at 167. As a consequence, to the extent that abstract beliefs make up part of a person's character, the decision today limits the aspects of character that sentencing authorities may consider.

We long have held that the Constitution permits courts and juries to consider character evidence in sentencing proceedings. See *Williams* v. *New York*, 337 U. S. 241, 247 (1949). Until today, we have never hinted that the First Amendment limits the aspects of a defendant's character that they may consider. To the contrary, we have emphasized that the sentencing authority "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U. S. 443, 446 (1972).

In *Williams*, for example, we upheld a New York law that encouraged the sentencing judge to consider evidence about the defendant's "past life, health, habits, conduct, and mental and moral propensities," 337 U. S., at 245, a phrase easily broad enough to encompass a substantial amount of First Amendment activity. Writing for the Court, Justice Black specifically identified religion and interests as sentencing considerations that may "give the sentencing judge a composite picture of the defendant." *Id.*, at 250, n. 15.

More recently, in *Franklin* v. *Lynaugh*, all five Members of the Court who addressed the issue agreed that religious activity may bear upon a defendant's character. See 487 U. S., at 186 (O'CONNOR, J., concurring in judgment) ("Evidence of . . . religious devotion might demonstrate positive character traits"); *id.*, at 190 (STEVENS, J., dissenting) ("Evidence of . . . regular church attendance" is relevant to character).[2] Although the opinions in *Franklin* endorsed

[2] In federal court, Federal Rule of Criminal Procedure 32(c)(2)(A) permits the presentence report following a criminal conviction to contain "information about the history and characteristics of the defendant . . . that may be helpful in imposing sentence." The Advisory Committee Note to the original version of this Rule, 18 U. S. C. App., p. 795, refers to a report that we endorsed in *Williams* v. *New York*, 337 U. S. 241, 250, n. 15 (1949): Administrative Office of the United States Courts, The Presentence Investigation Report, Pub. No. 101 (1943). This report explains: "Centuries of human experience have given testimony to the dynamic qualities of re-

consideration of religious activity as a mitigating factor, the endorsement necessarily disfavors abstention from religious activity, which the First Amendment also protects.

The Court nowhere explains why courts and juries may consider some First Amendment protected activities when assessing character, but they cannot consider others. Today's decision, moreover, does not define the boundaries of permissible inquiry into character. If the Court means that no First Amendment protected activity "ca[n] be viewed as relevant 'bad' character evidence in its own right," *ante*, at 168, then today's decision represents a dramatic shift in our sentencing jurisprudence.

B

Once the Court concludes that the gang membership evidence "has no relevance to the issues being decided in the [sentencing] proceeding," *ante*, at 160, I also have difficulty seeing what the First Amendment adds to the analysis. If the Court considers the evidence irrelevant, the problem is not that Delaware law bases the sentencing decision on impermissible issues, but rather that Dawson may not have received a fair trial on the permissible issues in the proceeding. The Due Process Clause, not the First Amendment, traditionally has regulated questions about the improper admission of evidence.

As we stated in *Chambers* v. *Florida*, 309 U. S. 227 (1940), the requirement of due process always has protected "the weak, or . . . helpless political, religious, or racial minorities and those who differed" by ensuring that "no man's life, liberty or property be forfeited as criminal punishment for violation of [the] law until there ha[s] been a charge fairly made

---

ligion. Religion may be a significant, decisive factor in enabling an individual to overcome his difficulties." *Id.*, at 10. The report also suggests that courts consider the defendant's "fraternal and social organizations." *Ibid.* A more recent edition of this report retains comparable instructions. See Administrative Office of the United States Courts, The Presentence Investigation Report, Pub. No. 105 (1984).

and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Id.*, at 236–237. We have made clear, in particular, that when a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne* v. *Tennessee*, 501 U. S., at 825; see *Darden* v. *Wainwright*, 477 U. S. 168, 179–183 (1986).

Our decision in *Schware* v. *Board of Bar Examiners of N. M.*, 353 U. S. 232 (1957), which the Court incorrectly cites, illustrates the point. In *Schware*, the New Mexico Supreme Court denied an applicant admission to the bar on grounds that he lacked good moral character. Evidence showed that the applicant had belonged to the Communist Party 15 years earlier. The Court erroneously states that *Schware* held that admitting proof of the applicant's membership in the Communist Party violated the First Amendment. *Ante*, at 168. *Schware*, in fact, did not decide that admitting the Communist Party evidence abridged any right of free political association. See 353 U. S., at 243, n. 13. It held, instead, that the state court erred in admitting the Communist Party evidence because it had no relevance to the applicant's moral character after so many years. See *id.*, at 246. Due process, the Court concluded, prohibited the state court to find the applicant morally unfit to practice law without any relevant evidence. See *id.*, at 247.

Applying familiar evidentiary standards in Dawson's case, the trial judge recognized that the "real issue" in admitting the gang membership evidence was whether its "probative value is outweighed by the danger of unfair prejudice." App. 52. The Delaware Supreme Court, likewise, examined the record to determine whether the gang membership evidence "improperly appeal[ed] to the juror's passions and prejudices concerning race, religion, or political affiliation." 581 A. 2d 1078, 1103 (1990). The standards employed by these courts went further than the fundamental unfairness

standard stated in *Payne* and therefore satisfied the requirements of due process. Dawson has presented no convincing argument, based on the record as a whole, that the courts misapplied these standards to the facts of his case. For these reasons, I would affirm.

Syllabus

GENERAL MOTORS CORP. ET AL. *v.* ROMEIN ET AL.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 90–1390. Argued December 10, 1991—Decided March 9, 1992

In 1980, the Michigan Legislature raised maximum weekly workers' compensation benefits and provided an annual supplemental adjustment to workers injured before 1980. The following year it enacted a statute allowing employers to decrease workers' compensation benefits to those disabled employees eligible to receive wage-loss compensation from other employer-funded sources. Some employers, including petitioners, General Motors Corporation and Ford Motor Company, took the position that the 1981 law's "benefit coordination" provision allowed them to reduce workers' compensation benefits to workers injured before the statute's effective date, who were receiving benefits from other sources. The State Supreme Court ultimately accepted this interpretation. *Chambers* v. *General Motors Corp.*, 422 Mich. 636, 375 N. W. 2d 715. In 1987, the legislature repudiated *Chambers* and required employers who had coordinated benefits for previously disabled workers under the 1981 law to refund the benefits withheld. The State Supreme Court upheld the 1987 law, rejecting petitioners' arguments that the reimbursement provision was unfairly retroactive and violated the Contract Clause and the Due Process Clause of the Federal Constitution.

Held:

1. The 1987 statute did not substantially impair the obligations of petitioners' contracts with their employees in violation of the Contract Clause, because there was no contractual agreement regarding the specific terms allegedly at issue. The contracts were entered into after collective bargaining between the parties before the 1981 law was enacted and make no express mention of workers' compensation benefits. Nor was the workers' compensation law an implied contract term whereby employers promised to pay the amount required by law for each payment period, an obligation that was completed by making payments for any disability period. There was no occasion for the parties to consider in bargaining taking place before the 1981 law's effective date the question whether an unanticipated reduction in benefits could later be restored after the "benefit period" had closed. Petitioners err in arguing that such a term is "incorporated" by law into the employment contracts, regardless of the parties' assent. Michigan law does not explicitly imply a contractual term allowing an employer to depend on the closure of past disability compensation periods; and such a right

Syllabus

does not appear to be so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a contract term. State regulations are usually implied terms regardless of assent only when those laws affect the validity, construction, and enforcement of contracts. See *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 19, n. 17. While changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter the contracts' bargained-for terms, the 1987 statute did not change the legal enforceability of the contracts here. The parties still have the same ability to enforce the bargained-for terms that they did before the 1987 statute's enactment. Petitioners' suggestion that every workplace regulation should be read into private employment contracts would expand the definition of contract so far that the Contract Clause would lose its purpose of enabling individuals to order their personal and business affairs according to their particular needs and interests; would cause the Clause to protect against all changes in legislation, regardless of those changes' effect on bargained-for agreements; would severely limit the ability of state legislatures to amend their regulatory legislation; and could render the Clause entirely dependent on state law. Pp. 186–191.

2. The 1987 statute did not violate the Due Process Clause. Its retroactive provision was a rational means of furthering the legitimate legislative purpose of correcting the results of the *Chambers* opinion. Cf. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 730. It preserved the legislative compromise that had been struck by the 1980–1981 laws—giving workers injured before 1982 their full benefits without coordination, but not the greater increases made to subsequently injured workers—and equalized the payments made by employers who had relied on *Chambers* with those who had not, cf. *United States* v. *Sperry Corp.*, 493 U. S. 52, 64–65. Pp. 191–192.

436 Mich. 515, 462 N. W. 2d 555, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Kenneth S. Geller argued the cause for petitioners. With him on the briefs were *Stephen M. Shapiro, Mark I. Levy, James D. Holzhauer, Charles A. Rothfeld, Lawrence C. Marshall, John M. Thomas, Theodore Souris, Martha B. Goodloe,* and *Daniel G. Galant.*

Theodore Sachs argued the cause for respondents. With him on the brief for respondents Romein and Gonzalez were

Robert M. Weinberg and *Laurence Gold. Frank J. Kelley*, Attorney General of Michigan, *pro se*, *Gay Secor Hardy*, Solicitor General, and *Thomas L. Casey*, Assistant Solicitor General, filed a brief for respondent Kelley.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1987, the Michigan Legislature enacted a statute that had the effect of requiring petitioners General Motors Corporation (GM) and Ford Motor Company (Ford) to repay workers' compensation benefits GM and Ford had withheld in reliance on a 1981 workers' compensation statute. Petitioners challenge the provision of the statute mandating these retroactive payments on the ground that it violates the Contract Clause and the Due Process Clause of the Federal Constitution.

I

Since at least 1974, workers' compensation law in Michigan has been the subject of legislative study and bitter debate. VanderLaan & Studley, Workers' Compensation Reform: A Case Study of the Legislative Process in Michigan, 14 U. Mich. J. L. Ref. 451, 452–454 (1981). "Literally dozens of conflicting legislative proposals" were offered each year, and all were fought to a standstill by competing interest groups. *Id.*, at 453. The legislative logjam was finally broken in 1980, when the Governor and four legislative leaders began a series of negotiations leading to an agreement on reforms.

---

*Briefs of *amici curiae* urging reversal were filed for Citizens Insurance Co. of America et al. by *Donald S. Young* and *Kathleen McCree Lewis;* for the Motor Vehicle Manufacturers Association of the United States, Inc., et al. by *David A. Strauss, William H. Crabtree, Dwight H. Vincent, J. Walker Henry,* and *Rachelle G. Silberberg;* and for the Washington Legal Foundation by *Scott G. Campbell, Daniel J. Popeo,* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Starr, Christopher J. Wright, Richard H. Seamon, Allen H. Feldman, Kerry L. Adams,* and *Ellen L. Beard;* and for the Council of State Governments et al. by *Richard Ruda* and *David Shapiro.*

"Neither side was able to obtain everything it wanted—possibly a good indication of the degree of balance this compromise represents." *Id.*, at 458.

Among other things, the 1980 legislation raised maximum weekly benefits to 90% of the state average weekly wage, and provided workers injured before 1980 an annual supplemental adjustment of their benefits of up to five percent. Mich. Comp. Laws Ann. §§ 418.355(2), 418.352(1) (West 1982). In 1981, the legislature enacted a statute allowing employers to decrease workers' compensation benefits to those disabled employees eligible to receive wage-loss compensation from other employer-funded sources. § 418.354. This provision, allowing what is called "benefit coordination," is at the heart of the controversy in this case.

The benefit coordination provision did not specify whether it was to be applied to workers injured before its effective date, March 31, 1982. Petitioners took the position that the 1981 law allowed them to reduce workers' compensation benefits to workers injured before March 31, 1982, who were receiving benefits from other sources. For example, GM cut respondent Romein's weekly payment by $132 per week, and Ford cut respondent Gonzalez' payment by $176 per week. The lower state courts disagreed with petitioners' interpretation, holding that coordination was allowed only for employees injured after 1982. See, *e. g.*, *Franks* v. *White Pine Copper Div., Copper Range Co.*, 122 Mich. App. 177, 185, 332 N. W. 2d 447, 449 (1982). Both Houses of the Michigan Legislature passed a concurrent resolution declaring that the coordination provisions were "not designed to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits resulting from injuries incurred prior to the act's effective date." See Senate Con. Res. 575, adopted by the Senate on April 1, 1982, and by the House on May 18, 1982; 1982 Senate J. 626, 706–707; 1982 House J. 1262. The same year, a bill was introduced in the Michigan Senate to amend the statute in this respect,

but it was not passed. Senate Bill 834, introduced on May 26, 1982.

Meanwhile, petitioners continued to attempt to persuade the Michigan courts that the 1981 statute should be applied to workers injured before its effective date. In 1985, petitioners' interpretation was accepted by the Michigan Supreme Court. *Chambers* v. *General Motors Corp.*, decided with *Franks* v. *White Pine Copper Div., Copper Range Co.*, 422 Mich. 636, 375 N. W. 2d 715. The court held that the benefit coordination provision applied to all payment periods after its effective date, regardless of the date the employee had been injured. The court also held that application of the coordination provisions to employees injured before 1982 did not violate the Contract Clause or the Due Process Clause.

After the decision in *Chambers*, employers who had not coordinated benefits for employees injured before 1982 began to demand reimbursement from these employees. See Jones, Firms Cut Checks for Disabled Workers, Detroit Free Press, Nov. 29, 1985, p. 3A. The Michigan Legislature responded almost immediately by introducing legislation to overturn the court's decision. On October 16, 1985, before the Michigan Supreme Court had ruled on the motion for rehearing in *Chambers*, House Bill 5084 was introduced. As amended and passed by the House on January 29, 1986, the bill repudiated the *Chambers* decision, declared that employers who had not coordinated benefits before the *Chambers* decision could not seek reimbursement from affected employees, and required employers who had coordinated benefits before *Chambers* to reimburse their employees. Meanwhile, the Senate passed its own version of the bill, Senate Bill 67, also disapproving the *Chambers* decision and providing that employers could not require employees to reimburse them for benefits not coordinated after 1982. The Senate bill was amended by a Conference Committee to provide for reimbursement of benefits withheld as a result of coordina-

tion, putting employers who had coordinated benefits for previously disabled workers in the same position as those who had not. House Legislative Analysis of Senate Bill 67, p. 2 (May 7, 1987). The amended Senate bill passed into law on May 14, 1987. 1987 Mich. Pub. Acts No. 28.

As a result of the 1987 statute, petitioners were ordered to refund nearly $25 million to disabled employees. They protested that the provision requiring reimbursement of benefits withheld was unfairly retroactive and violated the Contract Clause and the Due Process Clause. The Michigan Supreme Court upheld the statute against these challenges, on the ground that the employers had no vested rights in coordination for Contract Clause purposes, and that the retroactive provisions furthered a rational legislative purpose. 436 Mich. 515, 462 N. W. 2d 555 (1990). We granted certiorari, 500 U. S. 915 (1991), and now affirm.

II

Article I, § 10, of the Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Petitioners claim that the 1987 statute requiring reimbursement of benefits withheld in reliance on the 1981 coordination provisions substantially impaired the obligation of the contracts with their employees.

Generally, we first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 244 (1978); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 411 (1983). This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. Normally, the first two are unproblematic, and we need address only the third. In this case, however, we need not reach the questions of impairment, as we hold that there was no

contractual agreement regarding the specific workers' compensation terms allegedly at issue.

The contracts allegedly impaired by the 1987 statute are employment contracts entered into after collective bargaining between petitioners and respondents. It is undisputed that the contracts themselves were formed before the 1981 law was enacted requiring benefit coordination. It is also undisputed that the contracts make no express mention of workers' compensation benefits. Petitioners argue that the workers' compensation law is an implied term of the contracts, because the parties bargained for other compensation with workers' compensation benefits in mind. This implied term that was allegedly impaired by the 1987 statute is defined as a promise to pay the amount of workers' compensation required by law for each payment period. Once performance of this obligation is completed by making payments for any disability period, petitioners claim that they have a settled expectation that cannot be undone by later state legislation. Because the 1987 statute "reopens" these closed transactions, petitioners contend its retroactive provisions violate the Contract Clause.

The Michigan Supreme Court held that the term suggested by petitioners was not an implied term of the employment contracts between petitioners and respondents. We "accord respectful consideration and great weight to the views of the State's highest court," though ultimately we are "bound to decide for ourselves whether a contract was made." *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938). The question whether a contract was made is a federal question for purposes of Contract Clause analysis, see *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561 (1942), and "whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Appleby* v. *City of New York*, 271 U. S. 364, 380 (1926). In this case, however, we see no reason to disagree with the Michigan Supreme Court's conclusion.

While it is true that the terms to which the contracting parties give assent may be express or implied in their dealings, cf. *Garrison* v. *City of New York*, 21 Wall. 196, 203 (1875), the contracting parties here in no way manifested assent to limiting disability payments in accordance with the 1981 law allowing coordination of benefits. The employment contracts at issue were formed before the 1981 law allowing coordination of benefits came into effect. Thus, there was no occasion for the parties to consider in bargaining the question raised here: whether an unanticipated reduction in benefits could later be restored after the "benefit period" had closed.

Petitioners argue that their right to rely on past payment periods as "closed" is a contractual term "incorporated" by law into the employment contracts, regardless of the assent, express or implied, of the parties. While petitioners cite passages from our prior decisions that "'the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it,'" *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 429–430 (1934) (quoting *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550 (1867)), that principle has no application here, since petitioners have not shown that the alleged right to rely on past payment periods as closed was part of Michigan law at the time of the original contract. Though Michigan courts, in awarding interest on unpaid workers' compensation awards, had held that such awards were more analogous to contractual damages than tort damages, see, *e. g.*, *Wilson* v. *Doehler-Jarvis Division of National Lead Co.*, 358 Mich. 510, 517–519, 100 N. W. 2d 226, 229–230 (1960); *Brown* v. *Eller Outdoor Advertising Co.*, 139 Mich. App. 7, 14, 360 N. W. 2d 322, 326 (1984), Michigan law does not explicitly imply a contractual term allowing an employer to depend on the closure of past disability compensation periods. Moreover, such right does not appear to be so central to the bargained-for exchange between the par-

ties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract.

Contrary to petitioners' suggestion, we have not held that all state regulations are implied terms of every contract entered into while they are effective, especially when the regulations themselves cannot be fairly interpreted to require such incorporation. For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts. See *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 19, n. 17 (1977).

While it is somewhat misleading to characterize laws affecting the enforceability of contracts as "incorporated terms" of a contract, see 3 A. Corbin, Contracts § 551, pp. 199–200 (1960), these laws are subject to Contract Clause analysis because without them, contracts are reduced to simple, unenforceable promises. "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. . . . If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract." *McCracken* v. *Hayward*, 2 How. 608, 612 (1844). See also *Von Hoffman* v. *City of Quincy*, *supra*. A change in the remedies available under a contract, for example, may convert an agreement enforceable at law into a mere promise, thereby impairing the contract's obligatory force. See *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197–198 (1819); *Edwards* v. *Kearzey*, 96 U. S. 595, 601 (1878). For this reason, changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contracts' bargained-for terms. See, *e. g.*, *Von Hoffman* v. *City of Quincy*, *supra* (repeal of tax designed to

repay bond issue); *Bronson* v. *Kinzie*, 1 How. 311, 316 (1843) (law limiting foreclosure rights); *McCracken*, *supra*, at 611–614 (same).

The 1987 statute did not change the legal enforceability of the employment contracts here. The parties still have the same ability to enforce the bargained-for terms of the employment contracts that they did before the 1987 statute was enacted. Moreover, petitioners' suggestion that we should read every workplace regulation into the private contractual arrangements of employers and employees would expand the definition of contract so far that the constitutional provision would lose its anchoring purpose, *i. e.*, "enabl[ing] individuals to order their personal and business affairs according to their particular needs and interests." *Allied Structural Steel*, 438 U. S., at 245. Instead, the Clause would protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements. The employment contract, in petitioners' view, could incorporate workplace safety regulations, employment tax obligations, and laws prohibiting workplace discrimination, even if these laws are not intended to affect private contracts and are not subject to bargaining between the employer and employees. Moreover, petitioners' construction would severely limit the ability of state legislatures to amend their regulatory legislation. Amendments could not take effect until all existing contracts expired, and parties could evade regulation by entering into long-term contracts. The ultimate irony of petitioners' proposed principle is that, taken to an extreme, it would render the Contract Clause itself entirely dependent on state law. As Justice Story pointed out:

> "It has been contended, by some learned minds, that the municipal law of a place where a contract is made forms a part of it, and travels with it, wherever the parties to it may be found. If this were admitted to be true, the consequence would be, that all the existing laws of a State, being incorporated into the contract, would con-

> stitute a part of its stipulations . . . . If, therefore, the legislature should provide, by a law, that all contracts thereafter made should be subject to the entire control of the legislature, as to their obligation, validity, and execution, whatever might be their terms, they would be completely within the legislative power, and might be impaired or extinguished by future laws; thus having a complete *ex post facto* operation." 2 J. Story, Commentaries on the Constitution of the United States § 1383, pp. 252–253 (5th ed. 1891).

III

Petitioners also contend that the 1987 statute violated due process because its retroactive provisions unreasonably interfered with closed transactions. Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, "[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process": a legitimate legislative purpose furthered by rational means. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 730 (1984).

The statute in this case meets that standard. The purpose of the 1987 statute was to correct the unexpected results of the Michigan Supreme Court's *Chambers* opinion. The retroactive repayment provision of the 1987 statute was a rational means of meeting this legitimate objective: It preserved the delicate legislative compromise that had been struck by the 1980 and 1981 laws—giving workers injured before 1982 their full benefits without coordination, but not the greater increases given to subsequently injured workers. Also, it equalized the payments made by employers who had gambled on the *Chambers* decision with those made by employers who had not. Cf. *United States* v. *Sperry Corp.*, 493

U. S. 52, 64–65 (1989) (legitimate to legislate retrospectively in order to ensure that similarly situated persons bear similar financial burdens of program).

In sum, petitioners knew they were taking a risk in reducing benefits to their workers, but they took their chances with their interpretation of the 1981 law. Having now lost the battle in the Michigan Legislature, petitioners wished to continue the war in court. Losing a political skirmish, however, in itself creates no ground for constitutional relief.

Affirmed.

Syllabus

WILLIAMS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 90–6297. Argued November 6, 1991—Decided March 9, 1992

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission has promulgated Guidelines establishing sentencing ranges for different categories of federal offenses and defendants. The Act allows a district court to depart from a guideline range under certain circumstances, 18 U. S. C. § 3553(b), and provides for limited appellate review of sentences, requiring a remand for resentencing if a sentence (1) was imposed in violation of law or "as a result of an incorrect application" of the Guidelines, § 3742(f)(1), or (2) is an unreasonable departure from the applicable guideline range, § 3742(f)(2). Petitioner Williams was convicted in the Federal District Court of possession of a firearm by a convicted felon. The applicable sentencing range for someone in his criminal history category and at his offense level is 18 to 24 months. However, the District Court departed upward from that range and sentenced him to 27 months' imprisonment, determining that his criminal history category was inadequate because it did not include two convictions that were too old to be counted in the Guidelines' criminal history calculation and because it did not reflect several prior arrests. The Court of Appeals agreed that the convictions were reliable information indicating more extensive criminal conduct than was reflected by Williams' criminal history category, but it rejected the District Court's reliance upon the prior arrests, finding that the Guidelines prohibit a court from basing a departure on a prior arrest record alone and that the District Court had not adequately explained the factual basis for its use of those arrests as a ground for departure. Although the District Court had used both proper and improper factors to justify departure, the Court of Appeals affirmed the sentence on the ground that it was reasonable in light of the proper factors standing alone.

Held:

1. A reviewing court may, in appropriate circumstances, affirm a sentence in which a district court's departure from a guideline range is based on both valid and invalid factors. Pp. 197–202.

(a) Construing the plain language of the Guidelines and the Act, it is an incorrect application of the Guidelines for a district court to depart from the applicable sentencing range based on a factor that the Commission has already fully considered in establishing a guideline range or, as

in this case, on a factor that the Commission has expressly rejected as a ground for departure. An "incorrect application of the sentencing guidelines" occurs when the departure ground is prohibited either by the Guidelines or by general policy statements regarding the Guidelines' application, which the Commission is also authorized to promulgate, 28 U. S. C. § 994(a)(2). A policy statement is an authoritative guide to the meaning of the applicable Guideline, and an error in the statement's interpretation could lead to an incorrect determination that departure was appropriate. Pp. 199–201.

(b) When a district court relies upon an improper ground in departing from a guideline range, a reviewing court may not affirm a sentence based solely on its independent assessment that the departure is reasonable under § 3742(f)(2). In order to give full effect to both § 3742(f)(1) and § 3742(f)(2), the reviewing court must conduct separate inquiries under each provision to determine whether a remand is required. It may not focus on one provision to the exclusion of the other. Pp. 201–202.

(c) Williams' argument that a remand is automatically required under § 3742(f)(1) in order to rectify any "incorrect application" of the Guidelines is rejected. A remand is required only if a sentence is "imposed *as a result of* an incorrect application" of the Guidelines, *i. e.*, if the sentence would have been different but for the district court's error. The party challenging the sentence bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, but not the burden of proving that the invalid factor was determinative in the sentencing decision. Rather, once the court of appeals finds that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court determines that the error was harmless. Pp. 202–203.

(d) If the court of appeals determines that a remand is not required under § 3742(f)(1), it may affirm the sentence as long as it is also satisfied that the departure is reasonable under § 3742(f)(2). The reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing. In assessing reasonableness, a court must examine the factors to be considered in imposing a sentence under the Guidelines and the district court's stated reasons for the sentence's imposition. § 3742(e). A sentence can be "reasonable" even if some of the district court's reasons justifying departure are invalid, provided the remaining reasons are sufficient to justify the departure's magnitude. Pp. 203–204.

(e) The limited appellate review of sentencing decisions does not alter the traditional deference a court of appeals owes to a district court's exercise of its sentencing discretion, and the selection of the ap-

propriate sentence from within the guideline range and the decision to depart from that range are left solely to the sentencing court. Thus, when only some of the district court's reasons for departure are invalid, an appellate court may not affirm a sentence on the ground that the district court *could* have based its departure on the remaining factors, since the district court, once apprised of the errors in its interpretation of the Guidelines, may have chosen a different sentence. Pp. 204–205.

2. This Court declines to review the Court of Appeals' determination regarding the reliability of Williams' outdated convictions, because the propriety of the District Court's consideration of nonsimilar outdated convictions was not clearly presented in the petition for certiorari and was not briefed by either party. Pp. 205–206.

3. The case is remanded for a determination whether the sentence was imposed "as a result of" the District Court's erroneous consideration of Williams' prior arrests, since it cannot be ascertained whether the Court of Appeals concluded that the District Court would have imposed the same sentence even without relying upon Williams' prior arrest record or whether it affirmed simply on the basis that the sentence was reasonable under § 3742(f)(2). P. 206.

910 F. 2d 1574, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. WHITE, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 207.

Kenneth H. Hanson, by appointment of the Court, 499 U. S. 973, argued the cause and filed briefs for petitioner.

Amy L. Wax argued the cause for the United States. With her on the brief were *Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson*, and *Kathleen A. Felton.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The Sentencing Reform Act of 1984 (Act), as amended, 18 U. S. C. § 3551 *et seq.*, 28 U. S. C. §§ 991–998, created the United States Sentencing Commission and empowered it to promulgate guidelines establishing sentencing ranges for different categories of federal offenses and defendants. The

Act permits a district court to depart from the presumptive sentencing range prescribed by the Sentencing Guidelines only in certain circumstances. 18 U. S. C. § 3553(b). The Act also provides for limited appellate review of sentences in order to ensure the proper application of the Guidelines. § 3742. In this case, we consider the scope of appellate review, under the Act, of a sentence in which a district court has departed from the guideline sentencing range.

I

Petitioner Joseph Williams, a previously convicted felon, was the subject of an investigation conducted by the Bureau of Alcohol, Tobacco and Firearms in 1988 and 1989. He was indicted and convicted after a jury trial in the United States District Court for the Western District of Wisconsin for possession of a firearm while a convicted felon in violation of 18 U. S. C. § 922(g)(1).

The presentence report assigned Williams a criminal history category of V. App. 48. Combined with an offense level of 9, the applicable sentencing range under the Guidelines was 18 to 24 months. *Ibid.* The District Court departed upward from this range pursuant to § 4A1.3 of the Guidelines Manual, which allows a district court to increase a criminal history classification if "reliable information" indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal background or propensity for future criminal conduct. United States Sentencing Commission, Guidelines Manual § 4A1.3, p. s. (Nov. 1991) (USSG). The District Court determined that Williams' criminal history category was inadequate because it did not include two convictions that were too old to be counted in the Guidelines' criminal history calculation, see § 4A1.2(e)(1), and because it did not reflect several prior arrests. App. 53–54. Citing these two factors, the court looked to the next highest criminal history category, for

which the guideline range was 21 to 27 months. *Id.*, at 53–54. The court then sentenced Williams to 27 months' imprisonment and explained that it was selecting a sentence at the high end of the guideline range because Williams had previously been convicted for the same offense and because he had threatened an undercover agent in this case. *Id.*, at 55–56.[1]

The United States Court of Appeals for the Seventh Circuit upheld the conviction and the sentence. 910 F. 2d 1574 (1990). It agreed with the District Court that, under the circumstances of this case, the two outdated convictions were "reliable information" indicating more extensive criminal conduct than was reflected by Williams' criminal history category. *Id.*, at 1579. It rejected, however, the District Court's reliance upon Williams' prior arrests not resulting in prosecution. Although the Guidelines allow a court to consider "prior similar adult criminal conduct not resulting in a criminal conviction" in determining whether a departure is warranted, they prohibit a court from basing a departure on a prior arrest record alone. USSG §4A1.3, p. s. The Court of Appeals asserted that "the determination that the arrests indicated similar criminal conduct must be based on facts apart from the arrest record itself," 910 F. 2d, at 1580, and held that the District Court had not adequately explained the factual basis for its use of Williams' prior arrests as a ground for departure. *Ibid.*

Although it invalidated one of the two grounds mentioned by the District Court in its decision to depart, the Court of Appeals nevertheless affirmed Williams' sentence. It relied upon the Seventh Circuit precedent of *United States* v. *Franklin*, 902 F. 2d 501 (CA7), cert. denied *sub nom. Mann*

---

[1] Our reading of the sentencing transcript thus does not accord with the dissent's understanding that the District Court also considered Williams' prior conviction for the same offense in its decision to depart. See *post*, at 208.

v. *United States*, 498 U. S. 906 (1990), which held that when a sentencing court uses both proper and improper factors to justify a departure, the sentence can be affirmed if it is reasonable in light of the proper factors standing alone. 902 F. 2d, at 508–509. Applying *Franklin*, the Court of Appeals concluded that, despite the District Court's error in considering Williams' prior arrest record, the court had "correctly determined that Mr. Williams' criminality was not reflected properly in the criminal history category and that the relevant evidence justified the rather modest increase in sentence." 910 F. 2d, at 1580.

We granted certiorari, 499 U. S. 918 (1991), to resolve a conflict among the Circuits on whether a reviewing court may affirm a sentence in which a district court's departure from the guideline range is based on both valid and invalid factors. Compare *United States* v. *Zamarripa*, 905 F. 2d 337, 342 (CA10 1990) (when one or more of the stated grounds for departure is invalid, the case must be remanded for resentencing); *United States* v. *Hernandez-Vasquez*, 884 F. 2d 1314, 1315–1316 (CA9 1989) (same), with *United States* v. *Franklin*, *supra*, at 508–509 (when one or more of the stated grounds for departure is invalid, appellate court may affirm if sentence is still reasonable in light of remaining factors); *United States* v. *Rodriguez*, 882 F. 2d 1059, 1066–1068 (CA6 1989) (same), cert. denied, 493 U. S. 1084 (1990); *United States* v. *Hummer*, 916 F. 2d 186, 195, n. 8 (CA4 1990) (same), cert. denied, 499 U. S. 970 (1991).

II

The Act provides that a district court may depart from the sentencing range set by the Guidelines only when it finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U. S. C. § 3553(b). A defendant may file an appeal if a sentence was imposed in violation of law or as a

result of an incorrect application of the Guidelines, or if the district court departed upward from the guideline range. § 3742(a). Similarly, the Government may file an appeal if a sentence was imposed in violation of law or as a result of an incorrect application of the Guidelines, or if the district court departed downward from the guideline range. § 3742(b).

For both types of appeal, § 3742(f) delineates the following narrow scope of review:

> "If the court of appeals determines that the sentence—
>
> "(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> "(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—
>
> "(A) if it determines that the sentence is too high and the appeal has been filed [by the defendant], it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> "(B) if it determines that the sentence is too low and the appeal has been filed [by the Government], it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> "(3) is not described in paragraph (1) or (2), it shall affirm the sentence."

A

In the case before us, Williams urges that the District Court's use of his arrest record as a ground for departure was a misapplication of the Guidelines and that the "incor-

rect application" standard of § 3742(f)(1) means that once a departure ground is invalidated, a remand is always in order. The Government does not dispute that a district court's reliance upon an invalid factor in departing from the guideline sentencing range is appropriately characterized as an "incorrect application" of the Guidelines, but contends that a remand is only required when the error was determinative in the decision to depart.

We agree with both parties that a sentencing court's use of an invalid departure ground is an incorrect application of the Guidelines. The Guidelines echo the Act's instruction that a district court may depart from the applicable guideline range only when it finds an aggravating or mitigating circumstance "'not adequately taken into consideration by the Sentencing Commission'" in formulating the Guidelines. USSG § 1A4(b), p. s., § 5K2.0, p. s. (both quoting 18 U. S. C. § 3553(b)). Construing the plain language of the Guidelines Manual and the governing statute, we conclude that it is an incorrect application of the Guidelines for a district court to depart from the applicable sentencing range based on a factor that the Commission has already fully considered in establishing the guideline range or, as in this case, on a factor that the Commission has expressly rejected as an appropriate ground for departure.

Congress has defined "guidelines" as "the guidelines promulgated by the commission pursuant to section 994(a)." 28 U. S. C. § 998(c). Section 994(a) grants the Commission the authority to promulgate both "guidelines," § 994(a)(1), and "general policy statements regarding application of the guidelines," § 994(a)(2). The dissent draws a distinction between the "actual" guidelines and the policy statements that "interpre[t]" and "explai[n]" them; in the dissent's view, only the former can be incorrectly applied within the meaning of 18 U. S. C. § 3742(f)(1). *Post*, at 211–212. But to say that guidelines are distinct from policy statements is not to say that their meaning is unaffected by policy statements.

Where, as here, a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline. An error in interpreting such a policy statement could lead to an incorrect determination that a departure was appropriate. In that event, the resulting sentence would be one that was "imposed as a result of an incorrect application of the sentencing guidelines" within the meaning of § 3742(f)(1).[2] Similarly, an erroneous calculation under the Sentencing Table, from which all Guidelines sentencing ranges are derived, could properly be reviewed as an "incorrect application of the sentencing guidelines" under § 3742(f)(1) even though the Table itself is not officially designated as a "guideline." See USSG ch. 5, pt. A.

Because use of a departure ground prohibited by a policy statement can be an "incorrect application" of the Guidelines under § 3742(f)(1), we also agree with both Williams and the Government that, when a district court relies upon an improper ground in departing from the guideline range, a reviewing court may not affirm a sentence based solely on its independent assessment that the departure is reasonable under § 3742(f)(2). Section 3742(f) specifies two circum-

[2] The dissent states that an error in interpreting a policy statement governing departures "is not, in itself, subject to appellate review." *Post*, at 212. The dissent believes that all departure decisions must be reviewed under the "reasonableness" standard of § 3742(f)(2) and that the "reasonableness" determination includes an assessment of whether the district court properly found an "'aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'" *Post*, at 218 (quoting 18 U. S. C. § 3553(b)). But, in determining whether a circumstance was adequately taken into consideration, a court must consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." § 3553(b). Thus, the dissent would appear to agree that an appellate court *can* review the validity of a district court's reasons for departure for consistency with the Commission's policy statements; it simply considers that inquiry to go to the "reasonableness" of the decision to depart rather than to the correct application of the Guidelines.

stances in which a court of appeals must remand for resentencing: if the sentence was imposed as a result of an incorrect application of the Guidelines or if the sentence is an unreasonable departure from the applicable guideline range. The statute does not allow a court to focus on one remand provision to the exclusion of the other.

We do not believe that the dissent's contrary conclusion is supported by declarations from Congress and the Sentencing Commission which state that departure sentences are reviewable under § 3742(f)(2). *Post*, at 209–210, 212–213. We are unable to find any indication in those statements that departures from the Guidelines are to be reviewed *exclusively* under § 3742(f)(2). Thus, we believe that, while departure decisions are properly reviewed under § 3742(f)(2), they are *also* properly reviewed under § 3742(f)(1) when they are the result of an incorrect application of the Guidelines (considered in light of the relevant policy statements) that govern departure decisions. In order to give full effect to both provisions, therefore, the reviewing court is obliged to conduct two separate inquiries. First, was the sentence imposed either in violation of law or as a result of an incorrect application of the Guidelines? If so, a remand is required under § 3742(f)(1). If the court concludes that the departure is not the result of an error in interpreting the Guidelines, it should proceed to the second step: is the resulting sentence an unreasonably high or low departure from the relevant guideline range? If so, a remand is required under § 3742(f)(2).

Williams argues further that whenever a court of appeals finds that a district court considered an erroneous factor in sentencing, a remand is automatically required under § 3742(f)(1) in order to rectify an "incorrect application" of the Guidelines. We disagree. Section 3742(f)(1) does not call for a remand every time a sentencing court might misapply a provision of the Guidelines; rather, remand is required only if the sentence was "imposed *as a result of* an incorrect

application" of the Guidelines. When a district court has not intended to depart from the Guidelines, a sentence is imposed "as a result of" an incorrect application of the Guidelines when the error results in the district court selecting a sentence from the wrong guideline range. When a district court has intended to depart from the guideline range, a sentence is imposed "as a result of" a misapplication of the Guidelines if the sentence would have been different but for the district court's error. Accordingly, in determining whether a remand is required under § 3742(f)(1), a court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors.

We conclude that the party challenging the sentence on appeal, although it bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision. Rather, once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i. e.*, that the error did not affect the district court's selection of the sentence imposed. See Fed. Rule Crim. Proc. 52(a).

B

If the party defending the sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required under § 3742(f)(1), and the court of appeals may affirm the sentence as long as it is also satisfied that the departure is reasonable under § 3742(f)(2). The reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing. In assessing reasonableness under § 3742(f)(2), the Act directs a court of appeals to examine the factors to be considered in imposing a

sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence. § 3742(e). A sentence thus can be "reasonable" even if some of the reasons given by the district court to justify the departure from the presumptive guideline range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure.

C

The dissent interprets the "reasonableness" standard of § 3742(f)(2) to be the sole provision governing appellate review of departure decisions. The dissent also posits a two-step test of reasonableness: the appellate court must determine the reasonableness of the district court's decision to depart based on the court's stated reasons for departure, *post*, at 218, and the appellate court must determine the reasonableness of the amount or extent of departure, *post*, at 218–220. This is similar to our two-step inquiry, see *supra*, at 201–202, for determining when a remand is required. The dissent thus agrees that "[w]here all the reasons enunciated by the district court to support departure are found to be invalid," the appellate court "must set aside the sentence and remand the case," *post*, at 218, although it would find such a remand necessary because "the departure is *per se* unreasonable," *ibid.*, and not because it was imposed "as a result of" an incorrect application of the Guidelines. When some but not all of the district court's reasons for departure are invalid, however, the dissent's position requires the appellate court to consider whether the district court *could* have based its departure on the remaining factors, *post*, at 219, and not whether it *would* still have chosen so to act, *supra*, at 203.

In practical effect, therefore, the divergence of the dissent's interpretation of the statute from our own is in the degree of an appellate court's authority to affirm a sentence when the district court, once made aware of the errors in its interpretation of the Guidelines, may have chosen a different

sentence. Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court. USSG § 5K2.0, p. s. The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Solem* v. *Helm*, 463 U. S. 277, 290, n. 16 (1983).

Significantly, Congress amended the Act in 1986 to delete certain provisions that authorized an appellate court to correct a sentence determined to have been imposed as a result of an incorrect application of the Guidelines. See Criminal Law and Procedure Technical Amendments Act of 1986, § 73, 100 Stat. 3617. That action confirms our belief that it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines.

III

A

At oral argument in this Court, petitioner's counsel contended that both of the District Court's stated grounds for departure were invalid and therefore that Williams' sentence must have resulted from an incorrect application of the Guidelines. Tr. of Oral Arg. 42–43. Counsel argued that not only was it improper for the District Court to rely upon Williams' prior arrest record, but also that the Guidelines prevented the court from considering convictions more than 15 years old. *Id.*, at 43. The Guidelines explicitly authorize

a district court to base a departure on outdated convictions that are "evidence of similar misconduct," see USSG § 4A1.2, comment., n. 8, but the Circuits are divided as to whether, by implication, they prohibit a departure based on nonsimilar outdated convictions. Compare, *e. g.*, *United States* v. *Aymelek*, 926 F. 2d 64, 72–73 (CA1 1991) (nonsimilar outdated convictions may be appropriate grounds for departure); *United States* v. *Russell*, 905 F. 2d 1439, 1444 (CA10 1990) (same), with *United States* v. *Leake*, 908 F. 2d 550, 554 (CA9 1990) (upward departure can never be based on nonsimilar outdated convictions). In this case, the propriety of the District Court's consideration of Williams' nonsimilar outdated convictions was not clearly presented in the petition for certiorari and was not briefed by either party. Accordingly, we decline to review the Court of Appeals' determination that Williams' outdated convictions were reliable information that his criminal history category understated the extent of his criminal background. See 910 F. 2d, at 1578–1579.

B

The Court of Appeals was obliged to review, under both remand provisions of § 3742(f), a departure from the guideline range in which it found one of the two stated grounds for departure to be valid and the other to be invalid. We are unable to ascertain from its opinion whether the Court of Appeals concluded that the District Court would have imposed the same sentence even without relying upon Williams' prior arrest record, see § 3742(f)(1), or whether it affirmed simply on the basis that the sentence was reasonable under § 3742(f)(2). We therefore vacate the judgment below affirming Williams' sentence, and remand the case for a determination whether the sentence was imposed "as a result of" the District Court's erroneous consideration of his prior arrests not resulting in prosecution.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE KENNEDY joins, dissenting.

Title 18 U. S. C. § 3553(b),[1] a section of the Sentencing Reform Act of 1984 (Act), as amended, 18 U. S. C. § 3551 *et seq.* and 28 U. S. C. §§ 991–998, directs that in sentencing a convicted defendant, the district court shall impose a sentence of the kind and within the range referred to in § 3553(a)(4)[2] and established under the Guidelines issued by the Sentencing Commission, "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." If the court departs from the sentence that would be imposed within the range established pursuant to § 3553(a)(4), it must

---

[1] Section 3553(b) in relevant part states:

"(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

[2] Section 3553(a)(4) states in full:

"(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

. . . . . .

"(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U. S. C. 994(a)(1) and that are in effect on the date the defendant is sentenced . . . ."

state the specific reasons for such departure, § 3553(c).[3] If there is an upward departure the defendant may appeal. § 3742(a)(3).[4]

In the case before us, the District Court determined that the applicable guideline range inadequately depicted the defendant's criminality for three specific reasons, and that there should accordingly be an upward departure. The defendant, petitioner here, appealed. The Court of Appeals found one of the reasons given by the trial court to be invalid, but on the basis of the other two reasons, which were acceptable, it affirmed the sentence imposed. Petitioner claims that the Court of Appeals should have remanded to the District Court for resentencing.

Whether remand was required turns on the meaning and application of § 3742(f), which provides in full:

> "(f) Decision and disposition.—If the court of appeals determines that the sentence—

---

[3] Section 3553(c) in relevant part states:

"(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

"(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

"(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described."

[4] Section 3742(a)(3) states in full:

"(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

. . . . . .

"(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range . . . ."

"(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

"(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

"(3) is not described in paragraph (1) or (2), it shall affirm the sentence."

In arriving at its conclusion that there must be a remand in this case, the majority of the Justices of this Court have concluded that there was both "an incorrect application of the sentencing guidelines," § 3742(f)(1), and a sentence "outside the applicable guideline range," § 3742(f)(2). Also being of the view that the Court of Appeals did not fully deal with the former subsections, the majority orders a remand to the Court of Appeals.

It is my view, however, that where there is a departure from the applicable guideline range, any appeal is governed by § 3742(f)(2) alone, and not also by § 3742(f)(1). This appears to be the view of the United States Sentencing Commission:

> "Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U. S. C. § 3553(b). If the court sentences *within the guideline range*, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court *departs from the guideline range*, an appellate court may review the reasonableness of the departure. 18 U. S. C. § 3742." United States Sentencing Commission, Guidelines Manual § 1A.2, p. s. (Nov. 1991) (emphasis added).

The errors disposed of on appeal under § 3742(f) are to be determined under § 3742(e), which provides explicitly that, when reviewing the sentence imposed by the district court, the court on appeal shall determine only whether the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the Sentencing Guidelines; (3) is outside the applicable guideline range and is unreasonable; or (4) was imposed for an offense for which there is no applicable Sentencing Guideline and is plainly unreasonable.[5] For purposes of disposition by the appellate court, subsection (f) groups the first two and last two types of error together. The determination of error, however, occurs under subsection (e), which plainly identifies four wholly separate and distinguishable types of sentencing error—a nuance overlooked by the majority of the Court. Subsections (e)(2) and (e)(3), when read together, address different possible errors, each exclusive of the other: (e)(2) deals with possible misapplication of the Guidelines by the district court

---

[5] For its part, § 3742(e) simply mirrors the four separate grounds for appeal available to a defendant, § 3742(a), and to the Government, § 3742(b).

when determining and sentencing within the applicable guideline range; (e)(3) deals with possible errors by the district court when departing from the applicable guideline range.[6] Indeed, the majority—as well as both parties in their briefs on the merits and in response to our request for supplemental briefing—fails to define what the phrase "incorrect application of the sentencing guidelines" means. Absent such understanding, it is impossible to apply these appellate review provisions with any hope of meeting Congress' intent.

We deal here with a faulty interpretation of a policy statement, USSG § 4A1.3, p. s., by the District Court when deciding to depart from the otherwise applicable guideline range. Policy statements, however, even though contained in the Guidelines Manual, are not "guidelines" as referred to in § 3742(e)(2) and defined in the Act, 28 U. S. C. § 998(c), as "the guidelines promulgated by the Commission pursuant to section 994(a)." Congress has clearly distinguished between Guidelines and policy statements. The former are "for use of a sentencing court in determining the sentence to be imposed in a criminal case." § 994(a)(1). The latter are simply instructions "regarding application of the guidelines or any other aspect of sentencing or sentence implementation" furthering the purposes of the Act. § 994(a)(2). Only the Guidelines promulgated pursuant to § 994(a)(1) play a direct

---

[6] Commentary by the Chairman of the United States Sentencing Commission, Judge William Wilkins, Jr., of the Fourth Circuit, confirms this approach. See Wilkins, Sentencing Reform and Appellate Review, 46 Wash. & Lee L. Rev. 429, 437–444 (1989). His discussion of appellate review of guideline departures focused on the recognition that "the language of subsections 3742(e)(3) and (f)(2) . . . pertain[s] to consideration and disposition of a departure sentence appeal." *Id.*, at 441. Indeed, the plain language of the controlling statute so clearly dictated this approach that his discussion nowhere even recognizes the possibility that subsections (e)(2) and (f)(1) are implicated on the appellate review of a departure sentence. This view has carried the day in the Fourth Circuit. See *United States* v. *Summers*, 893 F. 2d 63, 64–67 (1990) (opinion of Wilkins, J.).

role in the calculation of points pertaining to the offense level and criminal history category reduced into the Sentencing Table, USSG § 5A, from which the applicable guideline range is drawn.[7] It follows that "application of the sentencing guidelines" refers only to those Guidelines relevant to the construction of the applicable guideline range.[8]

Even though policy statements are numbered and grouped in the Guidelines Manual by means identical to actual Guidelines, see USSG § 1B1.6, their purpose is limited to interpreting and explaining how to apply the Guidelines, and—significantly—"may provide guidance in assessing the reasonableness of any departure from the guidelines," § 1B1.7. While the district court must consider policy statements when determining the appropriate sentence, see 18 U. S. C. § 3553(a)(5), the Act's legislative history could not have been more explicit that an error in their interpretation is not, in itself, subject to appellate review:

> "It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review, *while one that is consistent with guidelines but inconsistent with the policy statements is not.* This is not intended to undermine the value of the policy statements. It is, instead, a recognition that the policy statements may be more general in nature than the guidelines and thus more difficult to use in determining the right to appellate review." S. Rep. No. 98–225,

---

[7] The interrelationship of subsections (a)(4), (b), and (c) of § 3553 compels this conclusion. See *supra*, at 207–208. For within these subsections, all reference ultimately is to those actual Guidelines, as opposed to policy statements, promulgated pursuant to 28 U. S. C. § 994(a)(1).

[8] The majority misinterprets this conclusion to be only that formally designated Guidelines "can be incorrectly applied within the meaning of 18 U. S. C. § 3742(f)(1)." *Ante*, at 200. What I plainly conclude, however, is that *only* these Guidelines are part of the district court's calculus when constructing the applicable guideline range, and it was to the propriety of this construction that Congress addressed itself in § 3742(e)(2).

p. 167 (1983) (emphasis added; footnote omitted) (hereinafter S. Report).[9]

The legislative history to 18 U. S. C. § 3557[10] is equally clear in this regard:

> "The provisions for appellate judicial review of sentences in section 3742 are designed to reduce materially any remaining unwarranted disparities by giving the right to appeal a sentence outside the guidelines *and by providing a mechanism to assure that sentences inside the guidelines are based on correct application of the guidelines.*" S. Report 86 (emphasis added).

The majority of the Justices asserts that, because one of three reasons for the upward departure imposed here by the District Court was invalid, an "incorrect application of the

---

[9] The legislative history behind the nature, role, and purpose of the district court's statement pursuant to 18 U. S. C. § 3553(c) of its reasons for imposing a particular sentence is similarly instructive:

"The statement of reasons for a sentence outside the guidelines is especially important. Under proposed 18 U. S. C. 3742, a defendant may appeal a sentence above the applicable guidelines, and the government may appeal a sentence below the guidelines. *If the appellate court finds that a sentence outside the guidelines is unreasonable, the case may be remanded to the trial court for resentencing . . . . The statement of reasons will play an important role in evaluation of the reasonableness of the sentence.* In fact, if the sentencing judge fails to give specific reasons for a sentence outside the guidelines, the appellate court would be justified in returning the case to the sentencing judge for such a statement.

"*Sentences within the guidelines are subject to appeal under proposed 18 U. S. C. 3742 on grounds of illegality or an incorrect application of the guidelines.* As with sentences outside the guidelines, the statement of reasons may play a role in the appellate court's decision on the legality of sentences. The statement of reasons in cases claiming incorrect application of the guidelines will probably play only a minor role in the appellate process because the sentencing court will be deciding factual issues concerning offense and offender characteristics which might not be discussed in the statement of reasons." S. Report 80 (emphasis added).

[10] "Review of a sentence. The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742." § 3557.

sentencing guidelines" within the meaning of §3742(e)(2) took place in this case.[11] As I have explained, however, this phrase refers only to the process by which the district court determines the applicable range of sentences when applying the "guidelines," as defined by 28 U. S. C. §998(c). The majority does not—and indeed *can* not—identify or claim that any error in determining the guideline range under the Guidelines is involved in this case. Instead, the majority does no more than declare that invalidly finding an aggravat-

---

[11] This confusion apparently stems from both parties' citation of *United States* v. *Hernandez-Vasquez*, 884 F. 2d 1314 (CA9 1989) *(per curiam)*, and *United States* v. *Zamarripa*, 905 F. 2d 337 (CA10 1990), in support of the proposition that, when one or more of the stated grounds for departure is invalid, the case must be remanded for resentencing. Be that as it may, neither case has concluded that the sentence should be treated as "an incorrect application of the sentencing guidelines," within the meaning of §3742(f)(1), when reviewing district court departures that rely on both proper and improper grounds. Not only do neither of these cases so hold, but neither case in any way purports to explain, much less cite, §3742. Instead, both cases simply rely on *United States* v. *Nuno-Para*, 877 F. 2d 1409, 1412–1414 (CA9 1989), for the above proposition. Also in reliance on *Nuno-Para*, *Zamarripa* added that the appellate court "cannot determine whether the same departure would have resulted absent the improper factor." 905 F. 2d, at 342. But *Nuno-Para* itself fails to cite, discuss, or explain §3742. The Ninth Circuit there simply concluded that "we must hold that the district court's departure was *unreasonable* because it improperly relied on factors already considered by the guidelines." 877 F. 2d, at 1414 (emphasis added). While such a construction of the review for "reasonableness" is too limited, see *infra*, at 217–220, any such consideration on appeal is clearly taken under §3742(f)(2). Moreover, a close study of the appellate review outlined by the Tenth Circuit in *Zamarripa* reveals that it in fact generally conforms to the approach outlined by my opinion here. See 905 F. 2d, at 339–340; see also *United States* v. *White*, 893 F. 2d 276, 277–278 (CA10 1990); *United States* v. *Diaz-Villafane*, 874 F. 2d 43, 49 (CA1), cert. denied, 493 U. S. 862 (1989).

Consequently, no case has been brought to our attention that has considered reliance upon both proper and improper grounds for departure to be "an incorrect application of the sentencing guidelines" within the meaning of §3742(f)(1). That the parties attempt to concede this point should not prevent our own scrupulous reading of these statutes, lest we disturb Congress' intent, which I find to be clearly expressed.

ing circumstance not adequately taken into account by the Sentencing Commission is an "'incorrect application' of the Guidelines," while referring only to two policy statements contained in the Guidelines Manual, see USSG §§1A4(b), p. s., and 5K2.0, p. s., which, the majority says, do no more than echo the statute.[12] *Ante,* at 200. Since the policy statements referred to by the majority merely refer to the statute, the majority's confusion about the distinction between Guidelines and policy statements is without import. But the majority concludes that the "Guidelines"—and we have here at issue only a policy statement, USSG §4A1.3, p. s.—qualify the propriety of basing a departure on arrest records, and that the District Court erred in relying on arrest records without further explanation. To the extent that the majority equates the District Court's misinterpretation of this policy statement with a misapplication of the Guidelines that must be dealt with under §3742(f)(1), it does so erroneously. Such error by the District Court signifies *only* an invalid grounds for departure, nothing more. While the majority concludes that such a policy statement "prohibits a district court from taking a specified action" and thereby "is an authoritative guide to the meaning of the applicable Guideline," *ante,* at 201, it remains a fact that this statute does not permit appellate review for the mere misinterpretation of a policy statement, see *supra,* at 212–213.

Significantly, subsections (a) and (b) of §3742 do not authorize appeal of a sentence imposed within the guideline range correctly determined under the Sentencing Guidelines. And if any alleged error is found to be without basis, the appellate court "shall affirm the sentence." 18 U. S. C.

---

[12] I point the majority to the language of one of the policy statements it cites: USSG §1A.4(b), p. s. When discussing guided departures of the type referred to in §4A1.3, p. s., the Sentencing Commission states that it "intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions *and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels*" (emphasis added).

§ 3742(f)(3). Thus, appellate review under § 3742(f)(1) has a much more focused inquiry than that given it by the majority. A sentence is imposed "as a result of" an incorrect application of the Sentencing Guidelines when the error results in a mistaken guideline range. When such an error is identified, remand is required.[13] To obtain relief under subsection (f)(1) insofar as it relates to a misapplication of the Guidelines, the appellant must demonstrate that an error has occurred that affects the applicable guideline range.[14]

---

[13] Contrary to the majority's conclusion, *ante*, at 202–203, appellate review of departure sentences under § 3742 does not accommodate "harmless-error" review. Subsections (f)(1) and (f)(2) both explicitly direct that, if appellate review discloses an error listed in subsection (e), the court "shall" remand for resentencing. As originally enacted, 18 U. S. C. § 3742 would have authorized an appellate court to "correct the sentence" determined to have been imposed in violation of law or as a result of an incorrect application of the sentencing guidelines. Pub. L. 98–473, § 213(a), 98 Stat. 2012. However, "[a]fter consideration, Congress determined that it was more appropriate for an appellate court to remand a case for further sentencing proceedings in all instances in which the district court decision was reversed, thereby leaving imposition of the final sentence to the district court." Wilkins, 46 Wash. & Lee L. Rev., at 433; see Pub. L. 99–646, § 73, 100 Stat. 3617. Deeming an error "harmless" does not conform with the appellate court's mandate. See *United States* v. *Stephenson*, 887 F. 2d 57, 62 (CA5 1989), cert. denied *sub nom. Goff* v. *United States*, 493 U. S. 1086 (1990).

[14] The unfortunate result of the majority's contrary conclusion, based as it is on an unnatural reading of this statute, is that appellate review becomes a quite complicated exercise, one which will apparently involve shifting "burdens" in the search for the subjective intent of the district court to determine whether "the sentence would have been different but for the district court's error." *Ante*, at 203. The baldness of this assertion is matched only by the total lack of guidance the majority provides to control this inquiry, apart from its opaque instruction that the appellate courts somehow "must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors." *Ibid.* This will likely provide the fodder for later confusion and conflict among the circuits, which I believe we could here avoid by a straightforward reading of this statute.

Looking to this case, there is no question but that the District Court correctly applied the relevant Guidelines to derive the properly applicable guideline range. The "Guideline" Williams places at issue, USSG §4A1.3, p. s., is specifically designated as a policy statement, dealing only with considerations of whether the criminal history category calculated under the Guidelines was so inadequate as to warrant a departure. This provision is solely to guide a district court's discretion should it find departure from the Guidelines appropriate. Because the District Court's error here in construing this policy statement could in no way affect the applicable guideline range, Williams is not entitled to relief pursuant to subsections 3742(e)(2) and (f)(1).

Accordingly, the only available appellate consideration here is whether Williams' sentence "is outside the applicable guideline range and is unreasonable." 18 U. S. C. §3742(f)(2). This inquiry is guided solely by §3742(e)(3), which states in full:

> "(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—
>
> . . . . .
>
> "(3) is outside the applicable guideline range, and is unreasonable, having regard for—
>
> "(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and
>
> "(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) . . . ."

Subsection (e)(3)(A) in fact refers to §3553(a), designating "factors to be considered in imposing a sentence."[15] It should be noted as well that the reasons to be assessed pur-

[15] Briefly recited, these factors include, *inter alia*, the seriousness of the offense, deterrence, public protection, the applicable guideline range, pertinent policy statements, and avoidance of unwarranted sentencing disparities. 18 U. S. C. §3553(a).

suant to subsection (e)(3)(B) arise directly from findings by the district court that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [in the applicable guideline range]." § 3553(b); see also nn. 3 and 9, *supra*.

Where all the reasons enunciated by the district court to support departure are found to be invalid, the departure is *per se* unreasonable, as nothing supports it, and the appellate court must set aside the sentence and remand the case, after stating specific reasons for its conclusion. 18 U. S. C. § 3742(f)(2). See n. 13, *supra*. The reasonableness inquiry is more involved when only one of several reasons supporting departure are found to be invalid. Not every circumstance left unconsidered by the Sentencing Commission warrants departure. Indeed, § 3553(b) requires a finding that the identified circumstances "should result" in a sentence outside the applicable guideline range.[16] By law the Guidelines generally provide a variance between the high and low ends of the range by the greater of six months or 25%. 28 U. S. C. § 994(b)(2). This provides both flexibility within the range as well as a check on disparity. Whether a departure then "should result" depends on the factors listed in § 3553(a) for consideration when imposing the sentence in the first instance. These same factors control the inquiry into the pro-

[16] The legislative history indicates that this language was intended to emphasize that not every unaccounted-for circumstance is a basis for departure: "The provision recognizes . . . that even though the judge finds an aggravating or mitigating circumstance in the case that was not adequately considered in the formulation of guidelines, the judge might conclude that the circumstance does not justify a sentence outside the guidelines. Instead, he might conclude that a sentence at the upper end of the range in the guidelines for an aggravating circumstance, or at the lower end of the range for a mitigating circumstance, was more appropriate or that the circumstance should not affect the sentence at all." S. Report 79. See also Wilkins, *supra*, at 439, and n. 52.

priety of the nature and extent of any departure made. In light of the surviving reasons enunciated by the district court, the appellate court must determine for itself the "reasonableness" of the departure under the factors to be considered when imposing sentence.[17] Subsection (a)(6)—"the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"—takes on added significance in judging the reasonableness of the extent of departure. Congress intended appellate review under the new sentencing regime to guide and control the discretion long reposed in the district courts towards the ultimate goal of sentencing reform: to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing. S. Report 78, 150, 161; see also 28 U. S. C. § 991(b)(1). The provisions of 18 U. S. C. § 3742 establish the limited practice of appellate review which Congress deemed "essential to assure that the guidelines are ap-

---

[17] The majority obliquely references *Solem* v. *Helm*, 463 U. S. 277, 290, n. 16 (1983), and its broad statement that an appellate court should not substitute its judgment for that of the sentencing court. *Ante*, at 204–205. Indeed, prior to the Sentencing Reform Act, appellate courts were generally bound by the simple principle that sentences imposed by district courts within legal limits should not be disturbed. *Dorszynski* v. *United States*, 418 U. S. 424, 431 (1974); *Gore* v. *United States*, 357 U. S. 386, 393 (1958). See S. Report 150. But that unquestioned deference evolved from the near-absolute discretion vested in the district courts prior to sentencing reform. *Ibid.* That discretion is now checked, however, and appellate courts are presented a statement of reasons explaining its exercise. In the situation we face here, a district court has made clear its conclusion that the applicable guideline range is inadequate. It is not a substitution of judgment for the appellate court to determine whether the district court's judgment remains valid. And in any event, this review of "reasonableness" is precisely what Congress intends the appellate courts to do. To the extent our decisions previously reigned in the scope of appellate review, they must be loosened to conform to this new mandate. Indeed, in its quotation of the *Solem* passage, the majority omits language showing it to be the general rule *only* "[a]bsent specific authority" favoring wider review. 463 U. S., at 290, n. 16.

plied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." S. Report 151. Because the district court must state its reasons when departing, § 3553(c)(2), and because the appellate court must "state specific reasons" for concluding a departure sentence is unreasonable, § 3742(f)(2), case law development will proceed apace, creating a ready benchmark by which to determine whether the current offender has been dealt a sentence disparate from similar criminals found guilty of similar crimes.[18] In sum, "while the reasonableness standard will be interpreted and defined by subsequent case law, the incorporation into this standard of the section 3553(b) departure test and the section 3553(a) sentencing factors provides specific content that will permit a broader judicial inquiry than otherwise would be warranted by a bare reasonableness standard alone." Wilkins, Sentencing Reform and Appellate Review, 46 Wash. & Lee L. Rev. 429, 444 (1989) (footnote omitted).

In this case, the Seventh Circuit concluded that it was error for the District Court to consider prior arrests not resulting in conviction because no reliable evidence of the conduct described in the arrest entries indicated a more severe criminal history than the one provided by the Guidelines. 910 F. 2d 1574, 1580 (1990); see USSG § 4A1.3, p. s. The Court of Appeals correctly ruled, however, that "a sentence nevertheless may be upheld if there are proper factors that, standing alone, would justify the departure." 910 F. 2d, at 1580 (citing *United States* v. *Franklin*, 902 F. 2d 501, 508–509

[18] The statements of reasons and development of case law will also permit the Sentencing Commission to "adequately consider" those factors leading to departures, ultimately resulting in less need for departures overall. See S. Report 151; USSG § 1A4(b), p. s. ("By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted").

(CA7 1990)). The Court of Appeals noted that the District Court had also properly relied upon convictions more than 15 years old, as well as the fact that the petitioner had previously been convicted of the same crime—felon in possession of a firearm.[19] 910 F. 2d, at 1580; see USSG §4A1.3, p. s.; *United States* v. *Schmude*, 901 F. 2d 555, 559 (CA7 1990). The court found both reasons to support a finding that the criminal history category did not adequately reflect the severity of petitioner's criminal past, and that his propensity for violence was laid bare in this case by his threats to the lives of the DEA agents and their families. 910 F. 2d, at 1580. In conclusion, the Court of Appeals considered the 3-month departure imposed by the District Court, and stated that "despite the error noted, the court correctly determined that Mr. Williams' criminality was not reflected properly in the criminal history category and that the relevant evidence justified the rather modest increase in sentence." *Ibid.*

This appellate assessment of the validity of the sentence imposed is sufficient. As previously stated by the Seventh Circuit in *Franklin*, it is not for the court on appeal "to probe the mind of the sentencing judge and try to determine what portions of the departure he or she assigned to the different grounds for departure." 902 F. 2d, at 508. Instead, the appellate court must assess for itself whether valid reasons stated by the district court justify the magnitude of departure. *Id.*, at 509. This the Seventh Circuit did without error, and I would affirm its judgment.

Accordingly, I respectfully dissent.

---

[19] The majority suggests this latter factor only played a role in "selecting a sentence at the high end of the guideline range" to which the District Court was departing. See *ante*, at 197; App. 54–55. What must be kept in mind, however, is that this was a departure sentence and, as recognized by the Seventh Circuit here, the reasons articulated to justify a particular sentence beyond the otherwise applicable guideline range are those supporting departure, as in this case, *e. g.*, where "the criminal history category is inadequate." 910 F. 2d, at 1580.

Syllabus

STRINGER *v.* BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–6616. Argued December 9, 1991—Decided March 9, 1992

After finding petitioner Stringer guilty of capital murder, a Mississippi jury, in the sentencing phase of the case, found that there were three statutory aggravating factors. These included the factor the murder was "especially heinous, atrocious or cruel," which had not been otherwise defined in the trial court's instructions. Stringer was sentenced to death, the sentence was affirmed by the State Supreme Court on direct review, and postconviction relief was denied in the state courts. The Federal District Court then denied Stringer habeas corpus relief, rejecting his contention that the "heinous, atrocious or cruel" aggravating factor was so vague as to render the sentence arbitrary, in violation of the Eighth Amendment's proscription of cruel and unusual punishment. The Court of Appeals ultimately affirmed, holding that Stringer was not entitled to rely on *Clemons* v. *Mississippi*, 494 U. S. 738, or *Maynard* v. *Cartwright*, 486 U. S. 356, in his habeas corpus proceedings because those decisions, which were issued after his sentence became final, announced a "new rule" as defined in *Teague* v. *Lane*, 489 U. S. 288.

Held: In a federal habeas corpus proceeding, a petitioner whose death sentence became final before *Maynard* and *Clemons* were decided is not foreclosed by *Teague* from relying on those cases. Pp. 227–237.

(a) When a petitioner seeks federal habeas relief based on a principle announced after a final judgment, *Teague* requires a federal court to determine, first, whether the decision in question announced a new rule, *i. e.*, was not dictated by precedent existing when the judgment became final. If the answer is yes and neither of two exceptions apply, the decision is not available to the petitioner. Second, if the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent. See *Butler* v. *McKellar*, 494 U. S. 407, 414–415. Pp. 227–228.

(b) For purposes of *Teague*, *Maynard* did not announce a new rule. Its invalidation of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was controlled by *Godfrey* v. *Georgia*, 446 U. S. 420, in which the Court held that Georgia's aggravating circumstance that the killing was "outrageously or wantonly vile, horrible and

inhuman" was vague and imprecise, inviting arbitrary and capricious application of the death penalty in violation of the Eighth Amendment. Pp. 228–229.

(c) This Court rejects the State's contention that, at the time Stringer's conviction became final and before *Clemons*, it would have been a new rule to apply the *Godfrey* and *Maynard* holdings to the Mississippi sentencing system because of differences between the use of aggravating factors in that system and their use in the Georgia system in *Godfrey*. The principal—and critical—difference between the two schemes is that Mississippi, unlike Georgia, is a "weighing" State, in which a jury that has found a defendant guilty of capital murder and found at least one statutory aggravating factor must weigh such factors against the mitigating evidence. *Zant* v. *Stephens*, 462 U. S. 862, 890, expressly left open the possibility that in a weighing State infection of the process with an invalid aggravating factor might require invalidation of the death sentence. Although *Clemons* later held that the appellate court in such a case could reweigh the aggravating and mitigating circumstances or undertake harmless-error analysis, this Court has not suggested that the Eighth Amendment permits a weighing-state appellate court to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process, but has required such courts to implement the well-established requirement of individualized sentencing determinations in death penalty cases, see, *e. g.*, *Zant*, *supra*, at 879. In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid factor does not infect the formal process of deciding whether death is appropriate. But when the sentencing body is told to weigh an invalid factor in its decision, the weighing process itself has been skewed. Thus, the fact that Mississippi is a weighing State only gives emphasis to the requirement that aggravating factors be defined with some degree of precision and underscores the applicability of *Godfrey* and *Maynard* to the Mississippi system. Pp. 229–232.

(d) Moreover, precedent existing at the time Stringer's sentence became final defeats the State's contention that before *Clemons* it was reasonable to believe that there was no constitutional requirement to define aggravating factors with precision in the Mississippi system. *Lowenfield* v. *Phelps*, 484 U. S. 231, distinguished. It is important that the Mississippi Supreme Court, the final authority on the meaning of Mississippi law, has at all times viewed the State's capital sentencing scheme as subject to *Godfrey*'s dictates. See, *e. g.*, *Gilliard* v. *State*, 428 So. 2d 576. The correctness of that view as a matter of federal law is so evident that the issue was not even mentioned in *Clemons*, in which the Court, unchallenged by the State, took for granted the propo-

sition that if a State uses aggravating factors in deciding who shall be eligible for, or receive, the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion. See 494 U. S., at 756, n. 1 (BLACKMUN, J., concurring in part and dissenting in part). The fact that two pre-*Clemons* Fifth Circuit cases ruled *Godfrey* inapplicable to Mississippi is not dispositive, since those cases ignored the State Supreme Court's own characterization of its law and accorded no significance to the centrality of aggravating factors in the weighing phase of a Mississippi capital sentencing proceeding, and were therefore seriously mistaken under precedents existing even before *Maynard* and *Clemons*. Pp. 232–237.

909 F. 2d 111, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SOUTER, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 238.

Kenneth J. Rose, by appointment of the Court, 502 U. S. 1011, argued the cause for petitioner. With him on the brief were *James W. Craig* and *Louis D. Bilionis*.

Marvin L. White, Jr., Assistant Attorney General of Mississippi, argued the cause for respondents. With him on the brief was *Mike Moore*, Attorney General.*

JUSTICE KENNEDY delivered the opinion of the Court.

The death sentence of the petitioner in this case was decreed by a judgment that became final before we decided

*Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Michael P. Hodge*, *Dana E. Parker*, and *Margaret Portman Griffey*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Grant Woods* of Arizona, *Daniel Lungren* of California, *Linley E. Pearson* of Indiana, *Frederic J. Cowan* of Kentucky, *William B. Webster* of Missouri, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of Nevada, *Lacy H. Thornburg* of North Carolina, *Susan B. Loving* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *Mary Sue Terry* of Virginia, and *Joseph B. Meyer* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

either *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), or *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). The petitioner argues that the State of Mississippi committed the same error in his case as it did in *Clemons*, and that under both *Maynard* and *Clemons* his sentence is unconstitutional. The question presented is whether in a federal habeas corpus proceeding a petitioner is foreclosed from relying on *Maynard* and *Clemons* because either or both announced a new rule as defined in *Teague* v. *Lane*, 489 U. S. 288 (1989).

I

In June 1982, Ray McWilliams and his wife, Nell, were shot to death in their Jackson, Mississippi, home as part of an armed robbery. The petitioner James R. Stringer did not fire the fatal shots, but he did plan the robbery and take part in it. The killing was part of his plan from the outset. The crimes, and their gruesome aspects, are described in the opinion of the Mississippi Supreme Court on direct review of the conviction and sentence. *Stringer* v. *State*, 454 So. 2d 468, 471–473 (1984).

Under Mississippi law the death sentence may be imposed for murders designated by statute as "capital murder." Miss. Code Ann. § 97–3–19(2) (Supp. 1991). A killing in the course of a burglary or robbery is included within that category. Following a capital murder conviction, the jury in the Mississippi system proceeds to the sentencing phase of the case. For a defendant who has been convicted of capital murder to receive the death sentence, the jury must find at least one of eight statutory aggravating factors, and then it must determine that the aggravating factor or factors are not outweighed by the mitigating circumstances, if any. § 99–19–101.

The jury found petitioner guilty of capital murder in the course of a robbery. In the sentencing phase the jury found that there were three statutory aggravating factors. The

aggravating factors as defined in the jury instructions, and for the most part following the statutory wording, were:

> "1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.
>
> "2. The capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant.
>
> "3. The capital murder was especially heinous, atrocious or cruel." Brief for Respondents 4.

The trial court in its instructions did not further define the meaning of the third factor.

On direct review the Mississippi Supreme Court affirmed. *Stringer* v. *State*, *supra*. With respect to the sentence, the court found it was not "imposed under the influence of passion, prejudice or any other arbitrary factor," *id.*, at 478; "the evidence fully support[ed] the jury's finding of statutorily required aggravating circumstances," *id.*, at 479; and the death sentence was not disproportionate to sentences imposed in other cases, *ibid.* Petitioner's conviction became final when we denied certiorari on February 19, 1985. *Stringer* v. *Mississippi*, 469 U. S. 1230. Postconviction relief was denied in the state courts. *Stringer* v. *State*, 485 So. 2d 274 (1986).

This case comes to us from proceedings begun when petitioner filed his first federal habeas petition in the United States District Court for the Southern District of Mississippi. The relevant claim is petitioner's contention that the third aggravating factor found by the jury and considered in the sentencing proceeding, the "heinous, atrocious or cruel" aggravating factor, was so vague as to render the sentence arbitrary, in violation of the Eighth Amendment's proscription of cruel and unusual punishment. The District Court found the claim subject to a procedural bar and, in the alter-

native, ruled it had no merit. *Stringer* v. *Scroggy*, 675 F. Supp. 356, 366 (1987).

Without consideration of the procedural bar question, the Court of Appeals affirmed on the merits, finding no constitutional infirmity in the jury's consideration of the third aggravating factor because two other aggravating factors were unchallenged. *Stringer* v. *Jackson*, 862 F. 2d 1108 (CA5 1988). When the Court of Appeals affirmed, we had not decided *Clemons* v. *Mississippi*, and we later vacated its opinion for further consideration. 494 U. S. 1074 (1990). On remand the Court of Appeals held that petitioner was not entitled to rely on *Clemons* or the related case of *Maynard* v. *Cartwright* in his habeas corpus proceeding because those decisions announced a new rule after his sentence was final. 909 F. 2d 111 (1990). The court relied upon its earlier analysis in *Smith* v. *Black*, 904 F. 2d 950 (1990), cert. pending, No. 90–1164, a case that had also presented the question whether *Clemons* and *Maynard* announced a new rule. We granted certiorari, 500 U. S. 915 (1991), and now reverse.

II

Subject to two exceptions, a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent existing when the judgment in question became final. *Butler* v. *McKellar*, 494 U. S. 407 (1990); *Penry* v. *Lynaugh*, 492 U. S. 302 (1989); *Teague* v. *Lane*, 489 U. S. 288 (1989). As we explained in *Butler*, "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." 494 U. S., at 414. Neither one of the exceptions is at issue here, so our inquiry is confined to the question whether *Clemons*, *Maynard*, or both announced a new rule.

When a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, *Teague* and our

subsequent decisions interpreting it require a federal court to answer an initial question, and in some cases a second. First, it must be determined whether the decision relied upon announced a new rule. If the answer is yes and neither exception applies, the decision is not available to the petitioner. If, however, the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent. See *Butler* v. *McKellar*, *supra*, at 414–415. The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent.

A

A determination whether *Maynard* and *Clemons* announced a new rule must begin with *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). In *Godfrey* we invalidated a death sentence based upon the aggravating circumstance that the killing was "outrageously or wantonly vile, horrible and inhuman." *Id.*, at 428–429. The formulation was deemed vague and imprecise, inviting arbitrary and capricious application of the death penalty in violation of the Eighth Amendment. We later applied the same analysis and reasoning in *Maynard*. In *Maynard* the aggravating circumstance under an Oklahoma statute applied to a killing that was "especially heinous, atrocious, or cruel." 486 U. S., at 359. We found the language gave no more guidance than did the statute in *Godfrey*, and we invalidated the Oklahoma formulation. 486 U. S., at 363–364.

In the case now before us Mississippi does not argue that *Maynard* itself announced a new rule. To us this appears a wise concession. *Godfrey* and *Maynard* did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited

to the precise language before us in that case. In applying *Godfrey* to the language before us in *Maynard*, we did not "brea[k] new ground." *Butler* v. *McKellar*, *supra*, at 412. *Maynard* was, therefore, for purposes of *Teague*, controlled by *Godfrey*, and it did not announce a new rule.

B

Of more substance is the State's contention that it was a new rule to apply the *Godfrey* and *Maynard* holdings to the Mississippi sentencing process. The State argues this must have been an open question when petitioner's sentence became final, with *Clemons* yet undecided. We acknowledge there are differences in the use of aggravating factors under the Mississippi capital sentencing system and their use in the Georgia system in *Godfrey*. In our view, however, those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final. Indeed, to the extent that the differences are significant, they suggest that application of the *Godfrey* principle to the Mississippi sentencing process follows, *a fortiori*, from its application to the Georgia system.

1

The principal difference between the sentencing schemes in Georgia and Mississippi is that Mississippi is what we have termed a "weighing" State, while Georgia is not. See *Clemons* v. *Mississippi*, 494 U. S., at 745; *Parker* v. *Dugger*, 498 U. S. 308, 318 (1991). Under Mississippi law, after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence. By contrast, in Georgia the jury must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should

receive it under all the circumstances of the case. Instead, under the Georgia scheme, "'[i]n making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.'" *Zant* v. *Stephens*, 462 U. S. 862, 872 (1983) (quoting the response of the Georgia Supreme Court to our certified question).

That Mississippi is a weighing State only gives emphasis to the requirement that aggravating factors be defined with some degree of precision. By express language in *Zant* we left open the possibility that in a weighing State infection of the process with an invalid aggravating factor might require invalidation of the death sentence. *Id.*, at 890. Although we later held in *Clemons* v. *Mississippi* that under such circumstances a state appellate court could reweigh the aggravating and mitigating circumstances or undertake harmless-error analysis, we have not suggested that the Eighth Amendment permits the state appellate court in a weighing State to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process.

We require close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. See *Zant*, *supra*, at 879; *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 601–605 (1978) (plurality opinion); *Roberts* v. *Louisiana*, 431 U. S. 633, 636–637 (1977); *Gregg* v. *Georgia*, 428 U. S. 153, 197 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Woodson* v. *North Carolina*, 428 U. S. 280, 303–304 (1976) (plurality opinion). In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defend-

ant is deprived of the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases.

These principles of appellate review were illustrated by our decision in *Barclay* v. *Florida*, 463 U. S. 939 (1983). Florida, like Mississippi, is a weighing State, *Parker* v. *Dugger*, *supra*, at 318, and the trial judge imposes the sentence based upon a recommendation from the jury. In *Barclay* the sentencing judge relied on an aggravating factor that was not a legitimate one under state law. We affirmed the sentence, but only because it was clear that the Florida Supreme Court had determined that the sentence would have been the same had the sentencing judge given no weight to the invalid factor. See 463 U. S., at 958 (plurality opinion); *id.*, at 973–974 (STEVENS, J., concurring in judgment). Therefore, contrary to the dissent's suggestion, *post*, at 245–247, the fact that both principal opinions in *Barclay* focused on the weight the sentencer gave to an invalid aggravating factor demonstrates that a reviewing court in a weighing State may not make the automatic assumption that such a factor has not infected the weighing process. In short, it may not make the automatic assumption that Stringer claims the Mississippi Supreme Court made in this case.

In view of the well-established general requirement of individualized sentencing and the more specific requirement that a sentence based on an improper factor be reassessed with care to assure that proper consideration was given, there was no arguable basis to support the view of the Court of Appeals that at the time petitioner's sentence became final the Mississippi Supreme Court was permitted to apply a rule of automatic affirmance to any death sentence supported by multiple aggravating factors, when one is invalid.

With respect to the function of a state reviewing court in determining whether the sentence can be upheld despite the use of an improper aggravating factor, the difference between a weighing State and a nonweighing State is not one of "semantics," as the Court of Appeals thought, *Stringer* v.

Jackson, 862 F. 2d, at 1115, but of critical importance. In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. This clear principle emerges not from any single case, as the dissent would require, *post*, at 243–247, but from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing. Thus, the principal difference between the sentencing systems of Mississippi and Georgia, the different role played by aggravating factors in the two States, underscores the applicability of *Godfrey* and *Maynard* to the Mississippi system.

2

Although it made no similar argument in *Clemons* itself, the State contends now that before *Clemons* it was reasonable to believe there was no constitutional requirement to define aggravating factors with precision in the Mississippi system. It points to the fact that in order for a jury to find a defendant guilty of capital murder it must find that the crime fits within the narrow and precise statutory definition of that offense. Any additional consideration of aggravating factors during the sentencing phase, under this view, is of no constitutional significance because the requisite differentia-

tion among defendants for death penalty purposes has taken place during the jury's deliberation with respect to guilt. The State cites our decision in *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988), in support of its analysis. But *Lowenfield*, arising under Louisiana law, is not applicable here and does not indicate that *Clemons* imposed a new rule.

In Louisiana, a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. 484 U. S., at 241. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. See *id.*, at 242 (quoting La. Rev. Stat. Ann. § 14:30A (West 1986)). After determining that a defendant is guilty of first-degree murder, a Louisiana jury next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine whether the death penalty is appropriate. 484 U. S., at 242. Unlike the Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors.

In *Lowenfield*, the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury duplicated the elements it already had found in determining there was a first-degree homicide. We rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Id.*, at 244–245. We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase. *Id.*, at 245 (discussing *Jurek* v. *Texas*, 428 U. S.

262 (1976)). We also contrasted the Louisiana scheme with the Georgia and Florida schemes. 484 U. S., at 245.

The State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court if an invalid aggravating factor is relied upon. In considering a *Godfrey* claim based on the same factor at issue here, the Mississippi Supreme Court considered decisions of the Florida Supreme Court to be the most appropriate source of guidance. In *Gilliard* v. *State*, 428 So. 2d 576, 586 (1983), the Mississippi Supreme Court compared the claim before it to the claim in *Dobbert* v. *State*, 375 So. 2d 1069 (Fla. 1979), cert. denied, 447 U. S. 912 (1980). The court stated:

> "In *Dobbert* . . . the Florida Supreme Court held that even though the lower court considered two circumstances which would not pass constitutional muster and did not amount to aggravating circumstances, there was one aggravating circumstance which existed and that it was sufficient to uphold the death penalty. The only distinction between *Dobbert* and the present case is that in *Dobbert*, under Florida law, the judge determined the sentence without a jury." *Gilliard*, *supra*, at 586.

Whether the Mississippi Supreme Court in *Gilliard* was adopting the kind of harmless-error rule we approved in *Barclay*, 463 U. S., at 958, and if so, whether it applied that same rule in Stringer's case, are questions relating to the merits of Stringer's claim which we need not consider here. What is dispositive is the fact that the Mississippi Supreme Court, which is the final authority on the meaning of Mississippi law, has at all times viewed the State's sentencing scheme as one in which aggravating factors are critical in

the jury's determination whether to impose the death penalty. See also *Evans* v. *State*, 422 So. 2d 737, 743 (Miss. 1982) (applying *Godfrey*). It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law. See *Teague* v. *Lane*, 489 U. S., at 310 (discussing federalism as one of the concerns underlying the nonretroactivity principle).

As a matter of federal law, moreover, the view of the Mississippi Supreme Court that *Godfrey*'s dictates apply to its capital sentencing procedure is correct. Indeed, it is so evident that the issue was not even mentioned in *Clemons*. There we took for granted, and the State did not challenge, the proposition that if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion. See *Clemons*, 494 U. S., at 756, n. 1 (opinion of BLACKMUN, J., joined by Brennan, Marshall, and STEVENS, JJ., concurring in part and dissenting in part) (noting that the unconstitutionality of the vague aggravating factor is implicit in the Court's opinion).

Even were we free to ignore the Mississippi Supreme Court's understanding of the way its own law works, we would reject the suggestion that *Lowenfield* could form the basis for an argument that *Godfrey* does not apply to Mississippi. Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the

use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Nothing in *Lowenfield* suggests that the proscription of vague aggravating factors does not apply to a capital sentencing system like Mississippi's. *Lowenfield* did not involve a claim that a statutory aggravating factor was ambiguous, and its relevance to *Godfrey*, which it did not find it necessary to cite, or the line of cases following from *Godfrey*, is slight at best.

We also note that the State's reliance on *Lowenfield* to show that it could not have anticipated *Godfrey*'s application to Mississippi is somewhat odd. For *Lowenfield*, after all, was decided when the petitioner's conviction and sentence already were final. It is a fiction for the State to contend that in 1984 its courts relied on a 1988 decision. This is not to say that a State could not rely on a decision announced after a petitioner's conviction and sentence became final to defeat his claim on the merits. It could. Insofar as our new rule jurisprudence "validates reasonable, good-faith interpretations of existing precedents," *Butler* v. *McKellar*, 494 U. S., at 414, however, the State may have little cause to complain if in deciding to allow a petitioner to rely upon a decision the federal courts look only to those precedents which the state courts knew at the relevant time. In any event, we need not dwell on the anachronism inherent in the State's *Lowenfield* argument because, as we have concluded, that case does not provide a basis for concluding that it was a new rule to apply *Godfrey* to the Mississippi system.

The State next argues that *Clemons*' application of *Godfrey* to Mississippi could not have been dictated by precedent because prior to *Clemons* the Fifth Circuit concluded that *Godfrey* did not apply to Mississippi. See *Evans* v. *Thigpen*,

809 F. 2d 239, cert. denied, 483 U. S. 1033 (1987); *Johnson* v. *Thigpen*, 806 F. 2d 1243 (1986), cert. denied, 480 U. S. 951 (1987). Before addressing the merits of this argument we reiterate that the rationale of the Fifth Circuit has not been adopted by the Mississippi Supreme Court, which, as a state court, is the primary beneficiary of the *Teague* doctrine. The Mississippi Supreme Court has recognized that it is bound by *Godfrey*. See, *e. g.*, *Mhoon* v. *State*, 464 So. 2d 77, 85 (1985) (requiring, based on *Godfrey*, that a capital sentencing jury be given a narrowing construction of the "heinous, atrocious or cruel" factor).

The Fifth Circuit's pre-*Clemons* views are relevant to our inquiry, see *Butler*, *supra*, at 415, but not dispositive. The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents. Reasonableness, in this as in many other contexts, is an objective standard, and the ultimate decision whether *Clemons* was dictated by precedent is based on an objective reading of the relevant cases. The short answer to the State's argument is that the Fifth Circuit made a serious mistake in *Evans* v. *Thigpen* and *Johnson* v. *Thigpen*. The Fifth Circuit ignored the Mississippi Supreme Court's own characterization of its law and accorded no significance to the fact that in Mississippi aggravating factors are central in the weighing phase of a capital sentencing proceeding. As we have explained, when these facts are accorded their proper significance, the precedents even before *Maynard* and *Clemons* yield a well-settled principle: Use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system.

We reverse the decision of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Today the Court holds that no reasonable jurist could have believed in 1985, two years after *Zant* v. *Stephens*, 462 U. S. 862 (1983), that the holding of that case would apply to a so-called "weighing" State. The Court maintains, on the contrary, that in 1985 it was obvious that a sentencer's weighing of a vague aggravating circumstance deprives a defendant of individualized sentencing. While that may be obvious after *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), I submit that was not so before this Court decided that case. I respectfully dissent.

I

Under the principle first announced in *Teague* v. *Lane*, 489 U. S. 288 (1989), a prisoner seeking habeas corpus relief in federal court generally cannot benefit from a new rule announced after the prisoner's conviction became final, *id.*, at 301 (plurality opinion), that is, after exhausting all direct appeals, see *Penry* v. *Lynaugh*, 492 U. S. 302, 314 (1989). A decision announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, at 301 (plurality opinion) (emphasis omitted). The result in a given case is not dictated by precedent if it is "susceptible to debate among reasonable minds," *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), or, put differently, if "reasonable jurists may disagree," *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990).

Petitioner's conviction became final for *Teague* purposes on February 19, 1985. He now claims the benefit of the rule that an Eighth Amendment violation occurs when a sentencer in a weighing State considers a vague aggravating circumstance, even if the sentencer has also found the existence of at least one other aggravating circumstance that is neither vague nor otherwise infirm. Because this Court never endorsed that position before February 19, 1985, I will discuss the relevant pre-1985 decisions, *infra*, Part I–A, and

the post-1985 decisions that, implicitly at least, announced the rule petitioner invokes, *infra*, Part I–B. Finally, I will enquire whether this rule was dictated by the pre-1985 decisions, *infra*, Part II.

A

The cases determining the apposite law before 1985 start with *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). Under the Georgia sentencing scheme, a defendant is given a life sentence unless the jury finds one or more aggravating circumstances. Once the jury does that, aggravating circumstances no longer play a role: the jury is instructed to determine whether the defendant should receive a death sentence by considering all the evidence in aggravation and in mitigation. The jury is not instructed to weigh any aggravating circumstances against mitigating circumstances. In *Godfrey*, a Georgia jury had returned a death verdict on the strength of just one aggravating circumstance, that the murder was "outrageously or wantonly vile, horrible and inhuman." *Id.*, at 426 (plurality opinion). Saying that "[a] person of ordinary sensibility could fairly categorize almost every murder as 'outrageously or wantonly vile, horrible and inhuman,'" *id.*, at 428–429, this Court held that this circumstance failed to impose any "restraint on the arbitrary and capricious infliction of the death sentence," *id.*, at 428. Accordingly, Georgia's sentencing scheme, as applied, violated the Eighth Amendment in the same way as the scheme struck down in *Furman* v. *Georgia*, 408 U. S. 238 (1972): it failed to "provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." 446 U. S., at 427 (internal quotation marks omitted).

After *Godfrey* came *Zant* v. *Stephens*, 462 U. S. 862 (1983), arising from a Georgia jury's death verdict based on a showing of several aggravating circumstances, one of which was that respondent had "a substantial history of serious assaultive criminal convictions," *id.*, at 866. Shortly after respond-

ent's sentencing, the Supreme Court of Georgia, in a different case, held that the "substantial history" circumstance left "a wide latitude of discretion in a jury as to whether or not to impose the death penalty," rendering a death sentence imposed upon the strength of the "substantial history" circumstance alone unconstitutional under *Furman*. *Arnold* v. *State*, 236 Ga. 534, 541, 224 S. E. 2d 386, 392 (1976). The Supreme Court of Georgia nevertheless refused to vacate Stephens' sentence, holding it adequately supported by the other, unchallenged, aggravating circumstances. *Stephens* v. *State*, 237 Ga. 259, 261–262, 227 S. E. 2d 261, 263, cert. denied, 429 U. S. 986 (1976). This Court agreed, holding *Godfrey* to be distinguishable because, in that case, the single aggravating circumstance failed to narrow the class of persons eligible for the death penalty, as required by the Eighth Amendment, 462 U. S., at 878, while in *Stephens*, the remaining aggravating circumstances properly discharged the narrowing obligation, *id.*, at 879. The vagueness of one among several aggravating circumstances was therefore held to be irrelevant, and the scheme itself adequate under *Furman*, 462 U. S., at 888–889, so long as it included mandatory appellate review for any arbitrariness or disproportionality stemming from some other source, *id.*, at 890.

The last relevant pre-1985 decision is *Barclay* v. *Florida*, 463 U. S. 939 (1983). The Florida scheme, like the one in Georgia, requires the sentencer to impose a life sentence if it finds no aggravating circumstances present. But, unlike Georgia, Florida is a weighing State, in which the sentencer who finds that one or more aggravating circumstances exist must determine the sentence by weighing aggravating and mitigating circumstances. In *Barclay*, a judge had imposed a death sentence after finding several aggravating circumstances, one of which was that the petitioner had a criminal record, *id.*, at 944–945, which Florida law did not recognize as an aggravating circumstance, *id.*, at 946. This Court held that the resulting death sentence did not violate the Eighth

Amendment, for the same reason the sentence in *Stephens* did not: the remaining aggravating circumstances satisfied the Eighth Amendment's narrowing requirement. See *id.*, at 957 (plurality opinion); *id.*, at 966–967 (STEVENS, J., concurring in judgment); see also *id.*, at 947–948, n. 5 (plurality opinion) (distinguishing *Godfrey* as involving only one aggravating circumstance).

B

The first case in which this Court applied the rule from which petitioner seeks to benefit was *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). There, an Oklahoma jury had found the presence of two aggravating circumstances, one of which was that the murder was "especially heinous, atrocious, or cruel." Because Oklahoma is a weighing State, the trial court had instructed the jury that, in determining the penalty, it should weigh these aggravating circumstances against any mitigating circumstances, and the jury had eventually returned a verdict of death. On collateral review, the Court of Appeals for the Tenth Circuit held that the "heinous, atrocious, or cruel" circumstance without further instruction was vague in the *Godfrey* sense. See *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1485–1491 (1987) (en banc). Distinguishing *Stephens*, the Court of Appeals held that this vagueness amounted to an Eighth Amendment violation because Oklahoma was a weighing State, 822 F. 2d, at 1480.[1] It vacated Cartwright's sentence, noting that Oklahoma's highest court had failed to cure the constitutional defect by either reweighing or performing harmless-error review, *id.*, at 1482.

This Court affirmed, holding that *Godfrey* controlled because the "especially heinous, atrocious, or cruel" circumstance gave no more guidance than the "outrageously or

[1] There are only hints in its opinion of the reason this distinction made a difference. See 822 F. 2d, at 1480–1481 (individualized sentencing); *id.*, at 1485 (narrowing).

wantonly vile, horrible and inhuman" circumstance in *Godfrey*, 486 U. S., at 363–364. The Court rejected Oklahoma's argument that Cartwright's sentence was adequately supported by the unchallenged aggravating circumstance, observing that Oklahoma's highest court had a practice of not attempting to "save the death penalty when one of several aggravating circumstances . . . was found invalid," *id.*, at 365. (Instead, that court would simply commute any death sentence imposed after finding an "invalid" aggravating circumstance into a sentence of life imprisonment, see *id.*, at 359.) The Court said that "the Court of Appeals cannot be faulted for not itself undertaking what the state courts themselves refused to do," *id.*, at 365.

Cartwright was followed by *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). Like Oklahoma, Mississippi is a weighing State, and a jury had returned a death verdict finding that two aggravating circumstances were present (one of which had been that the crime was "especially heinous, atrocious, or cruel"), and finding that these two aggravating circumstances outweighed any mitigating circumstances. The Supreme Court of Mississippi had affirmed, distinguishing *Cartwright* on the ground, *inter alia*, that, while Oklahoma had no procedure for salvaging a death sentence resting in part on a vague aggravating circumstance, there was an established procedure in Mississippi. "[W]hen one aggravating circumstance is found to be invalid . . . , a remaining valid aggravating circumstance will nonetheless support the death penalty verdict." 494 U. S., at 743–744 (internal quotation marks omitted). In this Court, Clemons argued that where a jury had originally imposed a death sentence, the Constitution demanded resentencing by a jury whenever a state appellate court found that the jury had considered an unconstitutionally vague aggravating circumstance. *Id.*, at 744. This Court rejected the argument, saying that nothing in the Constitution forbade a state appellate court to salvage an unconstitutional sentence, *id.*, at 745–750, although, at a

minimum, the state appellate court would have to reweigh or perform harmless-error review, *id.*, at 751–752.

In rejecting a more relaxed rule "authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance," the Court explained:

> "An automatic rule of affirmance in a weighing State would be invalid under *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. *Barclay* v. *Florida*, [*supra*, at 958]." *Id.*, at 752.

See also *Parker* v. *Dugger*, 498 U. S. 308, 321–322 (1991).

Today the Court adds to *Clemons*' explanation by reasoning that a sentencer's weighing of a vague aggravating circumstance deprives the defendant of individualized sentencing because it "creates the possibility . . . of randomness." *Ante*, at 236. The Court says that a sentencer's weighing of a vague aggravating circumstance may "ske[w]" the weighing process, *ante*, at 232, by placing a "thumb [on] death's side of the scale," *ibid.*, by "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," *ante*, at 235–236, or by "creat[ing] the possibility . . . of bias in favor of the death penalty," *ibid.*[2]

II

Like Godfrey and Stephens, the petitioner in the instant case was sentenced to death after a finding of a vague aggra-

[2] The mere fact that an aggravating circumstance inclines a sentencer more towards imposing the death penalty cannot, of course, violate the Eighth Amendment. I therefore read the majority opinion to object to the weighing of vague aggravating circumstances only because they skew the operation of the scheme by their random application from case to case.

vating circumstance. Like Stephens, but unlike Godfrey, he was sentenced on the basis of more than one aggravating circumstance, only one of which he challenged. The issue in this case, then, is whether it would have been reasonable to believe in 1985 that a sentencer's weighing of a vague[3] aggravating circumstance does not offend the Eighth Amendment so long as the sentencer has found at least one other valid aggravating circumstance.[4] Put differently, the question is whether it would have been reasonable to believe in 1985 that the holding in *Stephens* could apply to a weighing State. The majority answers these questions in the negative, saying that in 1985, no reasonable jurist could have failed to discover a concern with randomness in this Court's individualized-sentencing cases, or have failed to realize that a sentencer's weighing of a vague aggravating circumstance deprives a defendant of individualized sentencing. I think this answer endues the jurist with prescience, not reasonableness.

It is true that the Court in *Stephens* reserved judgment on the question whether its holding would apply to a weighing State:

---

[3] I say vague and not, as the majority does, invalid, see *ante*, at 230, 231. There might indeed have been invalid aggravating circumstances whose consideration, even with one or more valid ones, would have tainted an ensuing death sentence in any reasonable view in 1985. Thus, it would have been unreasonable to believe in 1985 that a capital sentence could stand, without more, if the sentencer had been instructed, say, to consider constitutionally protected behavior in aggravation. See *Barclay* v. *Florida*, 463 U. S. 939, 956 (1983) (plurality opinion); *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983). But I would apply that proposition to weighing and nonweighing States alike.

[4] Because, in this case, valid aggravating circumstances remained, I need not discuss respondents' argument that it was reasonable to believe in 1985 that the Mississippi murder statute performed all constitutionally required narrowing in the guilt phase of petitioner's trial. Cf. *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988).

> "[I]n deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." 462 U. S., at 890.

I agree that this statement would have put a reasonable jurist on notice that *Stephens*' rule might not apply to a weighing State, but the answer to the question reserved was no foregone conclusion. It is worth remembering that the Georgia jury in *Stephens* was instructed simply to "conside[r]" all aggravating and mitigating evidence, see *id.*, at 871, leaving it with what the respondent described as "unbridled discretion" at the final stage of sentencing, *id.*, at 875, which this Court found to be no violation of the Eighth Amendment, *id.*, at 875–880. If unguided discretion created no risk of randomness, it was hardly obvious that this risk arose when a vague aggravating circumstance was weighed. To conclude after *Stephens* that the outcome in *Cartwright* and *Clemons* was dictated is a leap of reason.

The leap lengthens when one considers *Barclay*, for I think a reasonable jurist, in 1985, could have concluded that this Court resolved the question reserved in *Stephens* when it decided *Barclay*, which strongly implied that the *Stephens* principle applied to weighing States like Florida. See 463 U. S., at 957 (plurality opinion); *id.*, at 966–967 (STEVENS, J., concurring in judgment). The majority attempts to minimize *Barclay* by saying that the *Barclay* Court upheld the sentence "only because it was clear that the Florida Supreme Court had determined that the sentence would have been the same had the sentencing judge given no weight to the invalid factor." *Ante*, at 231 (citing 463 U. S., at 958 (plurality opinion)). But I do not think *Barclay* can be explained away so easily.

It is true that the plurality opinion noted that the Supreme Court of Florida performed harmless-error review. *Ibid.* But the opinion's discussion of this point merely responded to Barclay's argument that the Supreme Court of Florida had failed to apply state-law precedent properly, which, Barclay maintained, required harmless-error review. See *id.*, at 957. The plurality rejected that argument, saying that failure to apply those cases would be "mere errors of state law [that] are not the concern of this Court," and that, in any event, the Supreme Court of Florida had, contrary to petitioner's assertions, performed harmless-error review. *Id.*, at 957–958. Nothing in the plurality's opinion suggests that harmless-error review would be constitutionally required where the sentencer had weighed an "invalid" aggravating circumstance.

It is also true that the concurrence of JUSTICE STEVENS and Justice Powell, who cast the deciding votes in *Barclay*, stated that Florida law required the Supreme Court of Florida to reweigh aggravating and mitigating circumstances. See *id.*, at 974 (opinion concurring in judgment). But that simply responded to Barclay's argument that the Supreme Court of Florida failed to perform the quantum of appellate review that the Constitution requires in every capital case (regardless of whether the trial court commits state-law error). See *id.*, at 972–973. JUSTICE STEVENS' opinion merely noted that the principal opinion in *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), had held that reweighing satisfied the appellate-review obligation imposed by the Constitution. 463 U. S., at 974. JUSTICE STEVENS never said that reweighing would be the constitutionally required minimum where the sentencer had weighed an "invalid" aggravating circumstance.

Although *Barclay* may be read as assuming that some appellate test must be passed if a death verdict is to stand in a weighing State despite the finding of an invalid aggravating

circumstance, nowhere do the opinions state that the State Supreme Court's mandated proportionality review would not satisfy the required constitutional minimum. See *Proffitt*, *supra*, at 258 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases"). Mississippi law requires just such review. See *ante*, at 226.

In sum, after *Barclay*, a jurist mindful of the *Stephens* caveat could reasonably have assumed that weighing one invalid aggravating circumstance along with one or more valid ones need not be treated as significant enough to amount to constitutional error in a State that at least provided appellate review for proportionality. That is dispositive under *Teague:* a reasonable reading of *Barclay* bars the conclusion that the result in *Cartwright* and *Clemons* was dictated by the cases on our books in 1985.

The Fifth Circuit, indeed, held as recently as 1988 that the rule in *Stephens* applied to a weighing State. See *Stringer* v. *Jackson*, 862 F. 2d 1108, 1115 (1988); *Edwards* v. *Scroggy*, 849 F. 2d 204, 211 (1988).[5] The conflict between its view and that of the Tenth Circuit, see *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1480 (1987) (en banc), is itself evidence that it was not unreasonable to believe in 1985 that *Stephens* would govern the result in this case. See *Butler* v. *McKellar*, 494 U. S., at 415. Nor, in light of my analysis, can the Fifth Circuit's opinion be dismissed as having "no arguable basis to support" the view expressed, *ante*, at 231.

III

In sum, I do not think that precedent in 1985 dictated the rule that weighing a vague aggravating circumstance neces-

[5] This was after we announced *Cartwright*. The Fifth Circuit distinguished that case in the same way the Supreme Court of Mississippi distinguished *Cartwright* in *Clemons*. See *Stringer*, 862 F. 2d, at 1113; *Edwards*, 849 F. 2d, at 211, n. 7.

sarily violates the Eighth Amendment as long as there is a finding of at least one other, unobjectionable, aggravating circumstance. It follows that I think it was reasonable to believe that neither reweighing nor harmless-error review would be required in that situation.

Syllabus

CONNECTICUT NATIONAL BANK *v.* GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 90–1791. Argued January 21, 1992—Decided March 9, 1992

In a suit by respondent Germain, the trustee of a bankrupt debtor's estate, seeking to hold petitioner Connecticut National Bank (CNB) liable for various torts and breaches of contract, the Bankruptcy Court denied CNB's motion to strike Germain's demand for a jury trial, and the District Court affirmed. The Court of Appeals dismissed CNB's attempted appeal for lack of jurisdiction, holding that a court of appeals may exercise jurisdiction over an interlocutory order in bankruptcy only when the district court issues the order after having withdrawn the case from the bankruptcy court, and not when the district court acts in its capacity as a bankruptcy court of appeals.

Held: An interlocutory order issued by a district court sitting as a court of appeals in bankruptcy is appealable under the unambiguous language of 28 U. S. C. § 1292. That section provides for review in the courts of appeals, in certain circumstances, of "[i]nterlocutory orders of the district courts," and does not limit such review to orders issued by district courts sitting as bankruptcy trial courts rather than appellate courts. Title 28 U. S. C. § 158(d)—which gives the courts of appeals jurisdiction over, *inter alia*, appeals from all final orders of district courts sitting as appellate courts in bankruptcy, but is silent as to review of interlocutory orders—does not limit the unadorned words of § 1292 by negative implication. Contrary to Germain's contention, giving effect to § 1292's companion provision, § 1291—which confers jurisdiction over appeals from "final decisions of the district courts" acting in any capacity—would not render § 158(d) wholly superfluous. Although §§ 1291 and 158(d) do overlap, § 158(d) also confers jurisdiction over the final decisions of bankruptcy appellate panels, such that each section reaches cases that the other does not. Redundancies across statutes are not unusual events in drafting, and where, as here, there is no positive repugnancy between two laws, a court must give effect to both. Pp. 251–254.

926 F. 2d 191, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed

an opinion concurring in the judgment, *post*, p. 255. O'CONNOR, J., filed an opinion concurring in the judgment, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 256.

Janet C. Hall argued the cause for petitioner. With her on the briefs were *G. Eric Brunstad, Jr.*, and *Linda L. Morkan.*

Thomas M. Germain argued the cause and filed a brief for respondent.

JUSTICE THOMAS delivered the opinion of the Court.

In this case, we determine the appealability of an interlocutory order issued by a district court sitting as a court of appeals in bankruptcy.

I

In 1984, O'Sullivan's Fuel Oil Co., Inc., filed a bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut. Although the case began as a reorganization under Chapter 11 of the Bankruptcy Code, in 1986 the Bankruptcy Court converted it into a liquidation under Chapter 7. Petitioner Connecticut National Bank (CNB) is successor in interest to one of O'Sullivan's creditors. Respondent Thomas M. Germain is trustee of O'Sullivan's estate.

On June 1, 1987, Germain sued CNB in Connecticut state court, seeking to hold the bank liable for various torts and breaches of contract. CNB removed the suit to the United States District Court for the District of Connecticut, which, pursuant to local rule, automatically referred the proceeding to the Bankruptcy Court overseeing the liquidation. Germain then filed a demand for a jury trial. CNB moved to strike Germain's demand. The Bankruptcy Court denied CNB's motion, *In re O'Sullivan's Fuel Oil Co.*, 103 B. R. 388 (Conn. 1989), and the District Court affirmed, *Germain* v. *Connecticut Nat. Bank*, 112 B. R. 57 (Conn. 1990).

CNB then tried to appeal to the Court of Appeals for the Second Circuit, but the court dismissed for lack of jurisdic-

tion. 926 F. 2d 191 (1991). The Second Circuit held that a court of appeals may exercise jurisdiction over interlocutory orders in bankruptcy only when a district court issues the order after having withdrawn a proceeding or case from a bankruptcy court, and not when the district court acts in its capacity as a bankruptcy court of appeals. We granted certiorari, 502 U. S. 905 (1991), and now reverse and remand.

II

Courts of appeals have jurisdiction over "[i]nterlocutory orders of the district courts of the United States" under 28 U. S. C. § 1292.* CNB contends that § 1292(b) applies by its terms in this case, and that the Second Circuit therefore could have exercised discretionary jurisdiction over its appeal. Germain argues that § 1292 does not apply at all in this case because Congress limited § 1292 through 28 U. S. C.

---

*That section provides in relevant part:

"(a) . . . [T]he courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof . . . ;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . ."

§ 158(d), which deals with bankruptcy jurisdiction. CNB responds that nothing in § 158(d) limits § 1292. We agree with CNB.

Bankruptcy appeals are governed for the most part by § 158. This section comprises four subsections, three of which concern us here. Subsection (a) gives the district courts authority to hear appeals from final and interlocutory orders of the bankruptcy courts. The District Court, as we have noted, had jurisdiction under this provision to hear CNB's appeal from the Bankruptcy Court. Subsection (b) permits the judicial council of any circuit to establish a bankruptcy appellate panel to fill the role of the district courts under subsection (a). Subsection (d), which is pivotal in this case, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section."

Neither this subsection nor any other part of § 158 mentions interlocutory orders entered by the district courts in bankruptcy. The parties agree, as they must, that § 158 did not confer jurisdiction on the Court of Appeals.

Germain contends that the Court of Appeals did not have jurisdiction under § 1292 either, for § 158(d), in his view, precludes jurisdiction under § 1292 by negative implication. Germain reasons as follows: Although §§ 1291 and 1292 appear to cover the universe of decisions issued by the district courts—with § 1291 conferring jurisdiction over appeals from final decisions of the district courts, and § 1292 conferring jurisdiction over certain interlocutory ones—that cannot in fact be so. If § 1291 did cover all final decisions by a district court, he argues, that section would render § 158(d) superfluous, since a final decision issued by a district court sitting as a bankruptcy appellate court is still a final decision of a district court. If § 158(d) is to have effect, Germain contends, then that section must be exclusive within its own

domain, which he defines as the universe of orders issued by district courts sitting pursuant to § 158(a) as courts of appeals in bankruptcy. When a district court enters an order in that capacity, Germain concludes, only § 158(d) can confer jurisdiction, and if it does not, nothing else can. Germain claims to find support for his view in his reading of the legislative history of § 158(d).

Contrary to Germain's contention, we need not choose between giving effect on the one hand to § 1291 and on the other to § 158(d), for the statutes do not pose an either-or proposition. Section 1291 confers jurisdiction over appeals from "final decisions of the district courts" acting in any capacity. Section 158(d), in contrast, confers jurisdiction over appeals from final decisions of the district courts when they act as bankruptcy appellate courts under § 158(a), and also confers jurisdiction over final decisions of the appellate panels in bankruptcy acting under § 158(b). Sections 1291 and 158(d) do overlap, therefore, but each section confers jurisdiction over cases that the other section does not reach.

Redundancies across statutes are not unusual events in drafting, and so long as there is no "positive repugnancy" between two laws, *Wood* v. *United States*, 16 Pet. 342, 363 (1842), a court must give effect to both. Because giving effect to both §§ 1291 and 158(d) would not render one or the other wholly superfluous, we do not have to read § 158(d) as precluding courts of appeals, by negative implication, from exercising jurisdiction under § 1291 over district courts sitting in bankruptcy. We similarly do not have to read § 158(d) as precluding jurisdiction under § 1292. While courts should disfavor interpretations of statutes that render language superfluous, in this case that canon does not apply.

In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a

legislature says in a statute what it means and means in a statute what it says there. See, *e. g.*, *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241–242 (1989); *United States* v. *Goldenberg*, 168 U. S. 95, 102–103 (1897); *Oneale* v. *Thornton*, 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin* v. *United States*, 449 U. S. 424, 430 (1981); see also *Ron Pair Enterprises*, *supra*, at 241.

Germain says that legislative history points to a different result. But we think that judicial inquiry into the applicability of § 1292 begins and ends with what § 1292 does say and with what § 158(d) does not. Section 1292 provides for review in the courts of appeals, in certain circumstances, of "[i]nterlocutory orders of the district courts of the United States." Section 158(d) is silent as to review of interlocutory orders. Nowhere does § 1292 limit review to orders issued by district courts sitting as trial courts in bankruptcy rather than appellate courts, and nowhere else, whether in § 158(d) or any other statute, has Congress indicated that the unadorned words of § 1292 are in some way limited by implication. "It would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202 (1819); see also *Regents of Univ. of Cal.* v. *Public Employment Relations Bd.*, 485 U. S. 589, 598 (1988). There is no reason to infer from either § 1292 or § 158(d) that Congress meant to limit appellate review of interlocutory orders in bankruptcy proceedings. So long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction.

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history.[1] In this case, such an examination is appropriate because petitioner's interpretation of 28 U. S. C. § 158(d) creates an unusual overlap with 28 U. S. C. § 1291.

Rejecting petitioner's position, the Court of Appeals concluded that in enacting the current system of bankruptcy appeals, Congress limited the scope of § 1292(b), excluding review by the courts of appeals of certain interlocutory bankruptcy orders. If Congress had intended such a significant change in the scheme of appellate jurisdiction, some indication of this purpose would almost certainly have found its way into the legislative history. The legislative record, however, contains no mention of an intent to limit the scope of § 1292(b). This silence tends to support the conclusion that no such change was intended.[2]

Accordingly, notwithstanding the inferences drawn by the Court of Appeals, the legislative history is not only consist-

---

[1] See *Wisconsin Public Intervenor* v. *Mortier* 501 U. S. 597, 611, n. 4 (1991) ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it"). As Judge Learned Hand advised, statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Lehigh Valley Coal Co.* v. *Yensavage*, 218 F. 547, 553 (CA2 1914), cert. denied, 235 U. S. 705 (1915). Legislative history helps to illuminate those purposes.

[2] See *American Hospital Assn.* v. *NLRB*, 499 U. S. 606, 613–614 (1991); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266–267 (1979); see also *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (REHNQUIST, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night"). Similarly, Justice Frankfurter's scholarly observation concerning the interpretation of a statutory text also applies to the analysis of legislative history: "One must . . . listen attentively to what it does not say." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947).

ent with petitioner's interpretation of the statute, but also actually supports it. For this reason, and because I agree with the Court's textual analysis, I concur in its judgment.

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, concurring in the judgment.

I agree that when Congress enacted 28 U. S. C. § 158(d) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress probably did not intend to deprive the courts of appeals of their longstanding jurisdiction over interlocutory appeals in bankruptcy cases. But I think we should admit that this construction of the statutes *does* render § 158(d) largely superfluous, and that we *do* strive to interpret statutes so as to avoid redundancy. Cf. *ante*, at 253–254. In this case, I think it far more likely that Congress inadvertently created a redundancy than that Congress intended to withdraw appellate jurisdiction over interlocutory bankruptcy appeals by the roundabout method of reconferring jurisdiction over appeals from final bankruptcy orders. I would reverse the judgment below only for this reason.

Per Curiam

PFZ PROPERTIES, INC. *v.* RODRIGUEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 91–122. Argued February 26, 1992—Decided March 9, 1992

Certiorari dismissed. Reported below: 928 F. 2d 28.

Thomas Richichi argued the cause for petitioner. With him on the briefs were *Albert J. Beveridge III*, *Kathryn E. Szmuszkovicz*, and *José Luis Novas-Dueño*.

Vanessa Ramirez-Kausz, Assistant Solicitor General of Puerto Rico, argued the cause for respondents. With her on the brief were *Jorge E. Perez-Diaz*, Attorney General, and *Anabelle Rodriguez-Rodriguez*, Solicitor General.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

---

*Briefs of *amici curiae* urging reversal were filed for the Institute for Justice by *William H. Mellor III*, *Clint Bolick*, and *Jonathan W. Emord*; for the Pacific Legal Foundation by *Ronald A. Zumbrun*, *Edward J. Connor, Jr.*, and *Timothy A. Bittle*; and for the Washington Legal Foundation et al. by *Charles T. Smith II*, *Steven A. Loewy*, *Daniel J. Popeo*, *John C. Scully*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Carmen M. Shepard* and *Andrew H. Baida*, Assistant Attorneys General, *Robert A. Butterworth*, Attorney General of Florida, and *Michael E. Carpenter*, Attorney General of Maine; for the Council of State Governments et al. by *Richard Ruda*, *Michael G. Dzialo*, and *Donald B. Ayer*; and for the Municipal Art Society of New York, Inc., by *William E. Hegarty*, *Michael S. Gruen*, *Philip K. Howard*, *Norman Marcus*, and *Philip Weinberg*.

Syllabus

HOLMES *v.* SECURITIES INVESTOR PROTECTION CORPORATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–727. Argued November 13, 1991—Decided March 24, 1992

Pursuant to its authority under the Securities Investor Protection Act (SIPA), respondent Securities Investor Protection Corporation (SIPC) sought, and received, judicial decrees to protect the customers of two of its member broker-dealers. After trustees were appointed to liquidate the broker-dealers' businesses, SIPC and the trustees filed this suit, alleging, among other things, that petitioner Holmes and others had conspired in a fraudulent stock-manipulation scheme that disabled the broker-dealers from meeting obligations to customers; that this conduct triggered SIPC's statutory duty to advance funds to reimburse the customers; that the conspirators had violated the Securities Exchange Act of 1934 and regulations promulgated thereunder; and that their acts amounted to a "pattern of racketeering activity" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1962, 1961(1), and (5), so as to entitle the plaintiffs to recover treble damages, § 1964(c). The District Court entered summary judgment for Holmes on the RICO claims, ruling, *inter alia*, that SIPC did not meet the "purchaser-seller" requirement for standing under RICO. The Court of Appeals held the finding of no standing to be error and, for this and other reasons, reversed and remanded.

Held: SIPC has demonstrated no right to sue Holmes under § 1964(c). Pp. 265–276.

(a) A plaintiff's right to sue under § 1964(c)—which specifies that "[a]ny person injured . . . by reason of a violation of [§ 1962] may sue therefor . . . and . . . recover threefold the damages he sustains . . ."—requires a showing that the defendant's violation was the proximate cause of the plaintiff's injury. Section 1964(c) was modeled on § 4 of the Clayton Act, which was itself based on § 7 of the Sherman Act, see *Associated General Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 530, and both antitrust sections had been interpreted to incorporate common-law principles of proximate causation, see, *e. g.*, *id.*, at 533–534, and n. 29, 536, n. 33. It must be assumed that the Congress which enacted § 1964(c) intended its words to have the same meaning that courts had already given them. Cf. *id.*, at 534. Although § 1964(c)'s language can be read to require only factual, "but for," causation, this

construction is hardly compelled, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades this Court that RICO should not get such an expansive reading. Pp. 265–268.

(b) As used herein, "proximate cause" requires some direct relation between the injury asserted and the injurious conduct alleged. For a variety of reasons, see *id.*, at 540–544, such directness of relationship is one of the essential elements of Clayton Act causation. Pp. 268–270.

(c) SIPC's claim that it is entitled to recover on the ground that it is subrogated to the rights of the broker-dealers' customers who did not purchase manipulated securities fails because the conspirators' conduct did not proximately cause those customers' injury. Even assuming, *arguendo*, that SIPC may stand in the shoes of such customers, the link is too remote between the stock manipulation alleged, which directly injured the broker-dealers by rendering them insolvent, and the nonpurchasing customers' losses, which are purely contingent on the broker-dealers' inability to pay customers' claims. The facts of this case demonstrate that the reasons supporting adoption of the Clayton Act direct-injury limitation, see *ibid.*, apply with equal force to § 1964(c) suits. First, if the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy, as opposed to, *e. g.*, the broker-dealers' poor business practices or their failures to anticipate financial market developments. Second, assuming that an appropriate assessment of factual causation could be made out, the court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages. Finally, the law would be shouldering these difficulties despite the fact that the directly injured broker-dealers could be counted on to bring suit for the law's vindication, as they have in fact done in the persons of their SIPA trustees. Indeed, the insolvency of the victim directly injured adds a further concern to those already expressed in *Associated General Contractors*, since a suit by an indirectly injured victim could be an attempt to circumvent the relative priority its claim would have in the directly injured victim's liquidation proceedings. This analysis is not deflected by the congressional admonition that RICO be liberally construed to effectuate its remedial purposes, since allowing suits by those injured only indirectly would open the door to massive and complex damages litigation, which would not only burden the courts, but also undermine the effectiveness of treble-damages suits. *Id.*, at 545. Thus, SIPC must await the outcome of the trustees' suit

and may share according to the priority SIPA gives its claim if the trustees recover from Holmes. Pp. 270–275.

(d) SIPC's claim that it is entitled to recover under a SIPA provision, 15 U. S. C. § 78eee(d), fails because, on its face, that section simply qualifies SIPC as a proper party in interest in any "matter arising in a liquidation proceeding" as to which it "shall be deemed to have intervened," and gives SIPC no independent right to sue Holmes for money damages. Pp. 275–276.

(e) This Court declines to decide whether every RICO plaintiff who sues under § 1964(c) and claims securities fraud as a predicate offense must have purchased or sold a security. In light of the foregoing, discussion of that issue is unnecessary to resolve this case. Nor will leaving the question unanswered deprive the lower courts of much-needed guidance. A review of those courts' conflicting cases shows that all could have been resolved on proximate-causation grounds, and that none involved litigants like those in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, who decided to forgo securities transactions in reliance on misrepresentations. P. 276.

908 F. 2d 1461, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, KENNEDY, and THOMAS, JJ., joined, and in all but Part IV of which WHITE, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE and STEVENS, JJ., joined, *post*, p. 276. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 286.

Jack I. Samet argued the cause for petitioner. With him on the briefs were *Jovina R. Hargis* and *Stephen K. Lubega*.

G. Robert Blakey argued the cause for respondents. With him on the brief for respondent Securities Investor Protection Corporation were *Stephen C. Taylor*, *Mark Riera*, *Theodore H. Focht*, and *Kevin H. Bell*.*

---

*Briefs of *amici curiae* urging reversal were filed for the American Institute of Certified Public Accountants by *Louis A. Craco* and *John J. Halloran, Jr.*; and for Arthur Andersen & Co. et al. by *Kathryn A. Oberly*, *Carl D. Liggio*, *Jon N. Ekdahl*, *Harris J. Amhowitz*, *Howard J. Krongard*, *Leonard P. Novello*, and *Eldon Olson*.

Kevin P. Roddy and *William S. Lerach* filed a brief for the National Association of Securities and Commercial Law Attorneys (NASCAT) as *amicus curiae* urging affirmance.

JUSTICE SOUTER delivered the opinion of the Court.

Respondent Securities Investor Protection Corporation (SIPC) alleges that petitioner Robert G. Holmes, Jr., conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's statutory duty to advance funds to reimburse the customers. The issue is whether SIPC can recover from Holmes under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968 (1988 ed. and Supp. II). We hold that it cannot.

I

A

The Securities Investor Protection Act of 1970 (SIPA), 84 Stat. 1636, as amended, 15 U. S. C. §§ 78aaa–78*lll*, authorized the formation of SIPC, a private nonprofit corporation, § 78ccc(a)(1), of which most broker-dealers registered under § 15(b) of the Securities Exchange Act of 1934, § 78o(b), are required to be "members," § 78ccc(a)(2)(A). Whenever SIPC determines that a member "has failed or is in danger of failing to meet its obligations to customers," and finds certain other statutory conditions satisfied, it may ask for a "protective decree" in federal district court. § 78eee(a)(3). Once a court finds grounds for granting such a petition, § 78eee(b)(1), it must appoint a trustee charged with liquidating the member's business, § 78eee(b)(3).

After returning all securities registered in specific customers' names, §§ 78fff–2(c)(2); 78fff(a)(1)(A); 78*lll*(3), the trustee must pool securities not so registered together with cash found in customers' accounts and divide this pool ratably to satisfy customers' claims, §§ 78fff–2(b); 78fff(a)(1)(B).[1] To

[1] Such "customer property," see 15 U. S. C. § 78*lll*(4), does not become part of the debtor's general estate until all customers' and SIPC's claims have been paid. See § 78fff–2(c)(1). That is to say, the claim of a general

the extent the pool of customer property is inadequate, SIPC must advance up to $500,000 per customer[2] to the trustee for use in satisfying those claims. § 78fff–3(a).[3]

B

On July 24, 1981, SIPC sought a decree from the United States District Court for the Southern District of Florida to protect the customers of First State Securities Corporation (FSSC), a broker-dealer and SIPC member. Three days later, it petitioned the United States District Court for the Central District of California, seeking to protect the customers of Joseph Sebag, Inc. (Sebag), also a broker-dealer and SIPC member. Each court issued the requested decree and appointed a trustee, who proceeded to liquidate the broker-dealer.

Two years later, SIPC and the two trustees brought this suit in the United States District Court for the Central District of California, accusing some 75 defendants of conspiracy in a fraudulent scheme leading to the demise of FSSC and Sebag. Insofar as they are relevant here, the allegations were that, from 1964 through July 1981, the defendants manipulated stock of six companies by making unduly optimistic statements about their prospects and by continually selling small numbers of shares to create the appearance of a liquid market; that the broker-dealers bought substantial amounts of the stock with their own funds; that the market's perception of the fraud in July 1981 sent the stocks plummeting;

---

creditor of the broker-dealer (say, its landlord) is subordinated to claims of customers and SIPC.

[2] With respect to a customer's cash on deposit with the broker-dealer, SIPC is not obligated to advance more than $100,000 per customer. § 78fff–3(a)(1).

[3] To cover these advances, SIPA provides for the establishment of a SIPC Fund. § 78ddd(a)(1). SIPC may replenish the fund from time to time by levying assessments, § 78ddd(c)(2), which members are legally obligated to pay, § 78jjj(a).

and that this decline caused the broker-dealers' financial difficulties resulting in their eventual liquidation and SIPC's advance of nearly $13 million to cover their customers' claims. The complaint described Holmes' participation in the scheme by alleging that he made false statements about the prospects of one of the six companies, Aero Systems, Inc., of which he was an officer, director, and major shareholder; and that over an extended period he sold small amounts of stock in one of the other six companies, the Bunnington Corporation, to simulate a liquid market. The conspirators were said to have violated § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), Securities and Exchange Commission (SEC) Rule 10b–5, 17 CFR § 240.10b–5 (1991), and the mail and wire fraud statutes, 18 U. S. C. §§ 1341, 1343 (1988 ed., Supp. II). Finally, the complaint concluded that their acts amounted to a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U. S. C. §§ 1962, 1961(1), and (5) (1988 ed. and Supp. II), so as to entitle the plaintiffs to recover treble damages, § 1964(c).

After some five years of litigation over other issues,[4] the District Court entered summary judgment for Holmes on the RICO claims, ruling that SIPC "does not meet the 'purchaser-seller' requirements for standing to assert RICO claims which are predicated upon violation of Section 10(b) and Rule 10b–5," App. to Pet. for Cert. 45a,[5] and that neither

---

[4] See generally *Securities Investor Protection Corporation* v. *Vigman*, 803 F. 2d 1513 (CA9 1986) *(Vigman II); Securities Investor Protection Corporation* v. *Vigman*, 764 F. 2d 1309 (CA9 1985) *(Vigman I)*.

[5] Two years earlier, the District Court had dismissed SIPC's non-RICO securities action on the ground that SIPC's claim to have been subrogated to the rights only of those customers who did not purchase any of the manipulated securities rendered the action a failure under the so-called *Birnbaum* test, which requires a plaintiff to be a purchaser or seller of a security. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975); *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (CA2), cert. denied, 343 U. S. 956 (1952). The Court of Appeals for the Ninth Circuit reversed

SIPC nor the trustees had satisfied the "proximate cause requirement under RICO," *id.*, at 39a; see *id.*, at 37a. Although SIPC's claims against many other defendants remained pending, the District Court under Federal Rule of Civil Procedure 54(b) entered a partial judgment for Holmes, immediately appealable. SIPC and the trustees appealed.

The United States Court of Appeals for the Ninth Circuit reversed and remanded after rejecting both of the District Court's grounds. *Securities Investor Protection Corporation* v. *Vigman*, 908 F. 2d 1461 (1990). The Court of Appeals held first that, whereas a purchase or sale of a security is necessary for entitlement to sue on the implied right of action recognized under § 10(b) and Rule 10b–5, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), the cause of action expressly provided by § 1964(c) of RICO imposes no such requirement limiting SIPC's standing, 908 F. 2d, at 1465–1467. Second, the appeals court held the finding of no proximate cause to be error, the result of a mistaken focus on the causal relation between SIPC's injury and the acts of Holmes alone; since Holmes could be held responsible for the acts of all his co-conspirators, the Court of Appeals explained, the District Court should have looked to the causal relation between SIPC's injury and the acts of all conspirators. *Id.*, at 1467–1469.[6]

Holmes' ensuing petition to this Court for certiorari presented two issues, whether SIPC had a right to sue under

---

that ruling, *Vigman II*, *supra*, holding that the District Court should have permitted SIPC to proceed under the *Birnbaum* rule to the extent that FSSC and Sebag had made unauthorized use of those customers' assets to buy manipulated securities, as SIPC had alleged they had. *Id.*, at 1519–1520. On remand, after discovery, the District Court ruled that no genuine issue of material fact existed on the question of unauthorized use and that Holmes was entitled to summary judgment. App. to Pet. for Cert. 27a. SIPC has not appealed that ruling.

[6] For purposes of this decision, we will assume without deciding that the Court of Appeals correctly held that Holmes can be held responsible for the acts of his co-conspirators.

RICO,[7] and whether Holmes could be held responsible for the actions of his co-conspirators. We granted the petition on the former issue alone, 499 U. S. 974 (1991), and now reverse.[8]

II

A

RICO's provision for civil actions reads that

> "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U. S. C. § 1964(c).

This language can, of course, be read to mean that a plaintiff is injured "by reason of" a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962,[9] the plaintiff was injured, and the defendant's viola-

---

[7] The petition phrased the question as follows: "Whether a party which was neither a purchaser nor a seller of securities, and for that reason lacked standing to sue under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 thereunder, is free of that limitation on standing when presenting essentially the same claims under the Racketeer Influenced and Corrupt Organizations Act ('RICO')." Pet. for Cert. i.

[8] Holmes does not contest the trustees' right to sue under § 1964(c), and they took no part in the proceedings before this Court after we granted certiorari on the first question alone.

[9] Section 1962 lists "Prohibited activities." Before this Court, SIPC invokes only subsections (c) and (d). See Brief for Respondent 15, and n. 58. Subsection (c) makes it "unlawful for any person . . . associated with any enterprise . . . to . . . participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." Insofar as it is relevant here, subsection (d) makes it unlawful to conspire to violate subsection (c). The RICO statute defines "pattern of racketeering activity" as "requir[ing] at least two acts of racketeering activity[,] . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." § 1961(5). The predicate offenses here at issue are listed in 18 U. S. C. §§ 1961(1)(B) and (D) (1988 ed., Supp. II), which

tion was a "but for" cause of plaintiff's injury. Cf. *Associated General Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 529 (1983). This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover[10] persuades us that RICO should not get such an expansive reading.[11] Not even SIPC seriously argues otherwise.[12]

---

define "racketeering activity" to include "any act which is indictable under . . . section 1341 (relating to mail fraud), [or] section 1343 (relating to wire fraud), . . . or . . . any offense involving . . . fraud in the sale of securities . . . ."

[10] "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'" W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984) (quoting *North* v. *Johnson*, 58 Minn. 242, 245, 59 N. W. 1012 (1894)). As we put it in the antitrust context, "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 [of the Clayton Act, 15 U. S. C. § 15,] there is a point beyond which the wrongdoer should not be held liable." *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 476–477 (1982) (internal quotation marks and citation omitted).

[11] The Courts of Appeals have overwhelmingly held that not mere factual, but proximate, causation is required. See, *e. g.*, *Pelletier* v. *Zweifel*, 921 F. 2d 1465, 1499–1500 (CA11), cert. denied, 502 U. S. 855 (1991); *Ocean Energy II, Inc.* v. *Alexander & Alexander, Inc.*, 868 F. 2d 740, 744 (CA5 1989); *Brandenburg* v. *Seidel*, 859 F. 2d 1179, 1189 (CA4 1988); *Sperber* v. *Boesky*, 849 F. 2d 60 (CA2 1988); *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F. 2d 384, 398 (CA7 1984), aff'd, 473 U. S. 606 (1985) *(per curiam)*. Indeed, the court below recognized a proximate-cause requirement. See *Securities Investor Protection Corporation* v. *Vigman*, 908 F. 2d 1461, 1468 (CA9 1990).

[12] SIPC does say that the question whether its claim must, and as alleged may, satisfy the standard of proximate causation is not within the question on which we granted certiorari. See Brief for Respondent 3, 33, 34, 38–39. However, the proximate-cause issue is "fairly included" within that question. See this Court's Rule 14.1(a). SIPC's own restatement of the question presented reads: "Was the Ninth Circuit correct when it held that SIPC need not be a 'purchaser or seller' of securities to sue under Section 1964(c), which provides that 'any person' may sue for 'injury to

The key to the better interpretation lies in some statutory history. We have repeatedly observed, see *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 150–151 (1987); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 241 (1987); *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 489 (1985), that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act, which reads in relevant part that

> "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.

In *Associated General Contractors*, *supra*, we discussed how Congress enacted § 4 in 1914 with language borrowed from § 7 of the Sherman Act, passed 24 years earlier.[13] Before 1914, lower federal courts had read § 7 to incorporate common-law principles of proximate causation, 459 U. S., at 533–534, and n. 29 (citing *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (CA3 1910); *Ames* v. *American Telephone & Telegraph Co.*, 166 F. 820 (CC Mass. 1909)), and we reasoned, as many lower federal courts had done before us, see *Associated Gen-*

---

his business or property' 'by reason of' 'any offense . . . involving fraud in the sale of securities . . . punishable under any law of the United States,' wire fraud, or mail fraud in violation of Section 1962?" Brief for Respondent i (ellipses in original). By thus restating the question presented (as was its right to do, see this Court's Rule 24.2), SIPC properly set the enquiry in the key of the language of § 1964(c), which we hold today carries a proximate-cause requirement within it. What is more, SIPC briefed the proximate-cause issue, see Brief for Respondent 34–36, 38–39, and announced at oral argument that it recognized the Court might reach it, see Tr. of Oral Arg. 31.

[13] When Congress enacted § 4 of the Clayton Act, § 7 of the Sherman Act read in relevant part:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue . . . ." 26 Stat. 210.

eral Contractors, supra, at 536, n. 33 (citing cases),[14] that congressional use of the § 7 language in § 4 presumably carried the intention to adopt "the judicial gloss that avoided a simple literal interpretation," 459 U. S., at 534. Thus, we held that a plaintiff's right to sue under § 4 required a showing that the defendant's violation not only was a "but for" cause of his injury, but was the proximate cause as well.

The reasoning applies just as readily to § 1964(c). We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. See *Cannon* v. *University of Chicago,* 441 U. S. 677, 696–698 (1979). It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them. See, *e. g., Oscar Mayer & Co.* v. *Evans,* 441 U. S. 750, 756 (1979); *Northcross* v. *Memphis Bd. of Ed.,* 412 U. S. 427, 428 (1973). Proximate cause is thus required.

B

Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984). Accordingly, among the many shapes this concept took at common law, see *Associated General Contractors, supra,* at 532–533, was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to

[14] These lower courts had so held well before 1970, when Congress passed RICO.

recover. See, *e. g.*, 1 J. Sutherland, Law of Damages 55–56 (1882).

Although such directness of relationship is not the sole requirement of Clayton Act causation,[15] it has been one of its central elements, *Associated General Contractors*, 459 U. S., at 540, for a variety of reasons. First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. *Id.*, at 542–543. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. *Id.*, at 543–544; *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 473–475 (1982); *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U. S. 251, 264 (1972). And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as

---

[15] We have sometimes discussed the requirement that a § 4 plaintiff have suffered "antitrust injury" as a component of the proximate-cause enquiry. See *Associated General Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 538 (1983); *Blue Shield of Virginia* v. *McCready*, 457 U. S., at 481–484. We need not discuss it here, however, since "antitrust injury" has no analogue in the RICO setting. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495–497 (1985).

For the same reason, there is no merit in SIPC's reliance on legislative history to the effect that it would be inappropriate to have a "private litigant . . . contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'" 115 Cong. Rec. 6995 (1969) (American Bar Association comments on S. 2048). That statement is rightly understood to refer only to the applicability of the concept of "antitrust injury" to RICO, which we rejected in *Sedima*, *supra*, at 495–497. See *Brandenburg* v. *Seidel*, 859 F. 2d, at 1189, n. 11. Besides, even if we were to read this statement to say what SIPC says it means, it would not amount to more than background noise drowned out by the statutory language.

private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely. *Associated General Contractors, supra,* at 541–542.

We will point out in Part III–A below that the facts of the instant case show how these reasons apply with equal force to suits under § 1964(c).

III

As we understand SIPC's argument, it claims entitlement to recover, first, because it is subrogated to the rights of those customers of the broker-dealers who did not purchase manipulated securities, and, second, because a SIPA provision gives it an independent right to sue. The first claim fails because the conspirators' conduct did not proximately cause the nonpurchasing customers' injury, the second because the provision relied on gives SIPC no right to sue for damages.

A

As a threshold matter, SIPC's theory of subrogation is fraught with unanswered questions. In suing Holmes, SIPC does not rest its claimed subrogation to the rights of the broker-dealers' customers on any provision of SIPA. See Brief for Respondent 38, and n. 181. SIPC assumes that SIPA provides for subrogation to the customers' claims against the failed broker-dealers, see 15 U. S. C. §§ 78fff–3(a), 78fff–4(c); see also § 78fff–2(c)(1)(C); see generally *Mishkin* v. *Peat, Marwick, Mitchell & Co.*, 744 F. Supp. 531, 556–557 (SDNY 1990), but not against third parties like Holmes. As against him, SIPC relies rather on "common law rights of subrogation" for what it describes as "its money paid to customers for customer claims against third parties." Brief for Respondent 38 (footnote omitted). At oral argument in this Court, SIPC narrowed its subrogation argument to cover only the rights of customers who never purchased manipu-

lated securities. Tr. of Oral Arg. 29.[16] But SIPC stops there, leaving us to guess at the nature of the "common law rights of subrogation" that it claims, and failing to tell us whether they derive from federal or state common law, or, if the latter, from common law of which State.[17] Nor does SIPC explain why it declines to assert the rights of customers who bought manipulated securities.[18]

It is not these questions, however, that stymie SIPC's subrogation claim, for even assuming, *arguendo*, that it may stand in the shoes of nonpurchasing customers, the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers. That is, the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims. Although the customers' claims are senior (in recourse to "customer property") to those of the broker-dealers' general creditors, see § 78fff–2(c)(1), the causes of their respective injuries are the same: The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors.

As we said, however, in *Associated General Contractors*, quoting Justice Holmes, "'The general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" 459 U. S., at 534 (quoting *Southern Pacific Co.* v.

---

[16] And, SIPC made no allegation that any of these customers failed to do so in reliance on acts or omissions of the conspirators.

[17] There is support for the proposition that SIPC can assert state-law subrogation rights against third parties. See *Redington* v. *Touche Ross & Co.*, 592 F. 2d 617, 624 (CA2 1978), rev'd on other grounds, 442 U. S. 560 (1979). We express no opinion on this issue.

[18] The record reveals that those customers have brought their own suit against the conspirators.

Darnell-Taenzer Lumber Co., 245 U. S. 531, 533 (1918)),[19] and the reasons that supported conforming Clayton Act causation to the general tendency apply just as readily to the present facts, underscoring the obvious congressional adoption of the Clayton Act direct-injury limitation among the requirements of § 1964(c).[20] If the nonpurchasing customers were

---

[19] SIPC tries to avoid foundering on the rule that creditors generally may not sue for injury affecting their debtors' solvency by arguing that those customers that owned manipulated securities themselves were victims of Holmes' fraud. See Brief for Respondent 39, n. 185 (citing *Ashland Oil, Inc.* v. *Arnett*, 875 F. 2d 1271, 1280 (CA7 1989); *Ocean Energy*, 868 F. 2d, at 744–747; *Bankers Trust Co.* v. *Rhoades*, 859 F. 2d 1096, 1100–1101 (CA2 1988), cert. denied, 490 U. S. 1007 (1989)). While that may well be true, since SIPC does not claim subrogation to the rights of the customers that purchased manipulated securities, see *supra*, at 270–271, it gains nothing by the point.

We further note that SIPC alleged in the courts below that, in late May 1981, Joseph Lugo, an officer of FSSC and one of the alleged conspirators, parked manipulated stock in the accounts of customers, among them Holmes, who actively participated in the parking transaction involving his account. See Statement of Background and Facts, 1 App. 223–225. Lugo "sold" securities owned by FSSC to customers at market price and "bought" back the same securities some days later at the same price plus interest. Under applicable regulations, a broker-dealer must discount the stock it holds in its own account, see 17 CFR § 240.15c3–1(c)(2)(iv)(F)(1)(vi) (1991), and the sham transactions allowed FSSC to avoid the discount. But for the parking transactions, FSSC would allegedly have failed capital requirements sooner; would have been shut down by regulators; and would not have dragged Sebag with it in its demise. 1 App. 231. Thus, their customers would have been injured to a lesser extent. *Id.*, at 229, 231. We do not rule out that, if, by engaging in the parking transactions, the conspirators committed mail fraud, wire fraud, or "fraud in the sale of securities," see 18 U. S. C. §§ 1961(1)(B) and (D) (1988 ed., Supp. I), the broker-dealers' customers might be proximately injured by these offenses. See, *e. g.*, *Taffet* v. *Southern Co.*, 930 F. 2d 847, 856–857 (CA11 1991); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F. 2d 1295, 1311–1312 (CA2 1990). However this may be, SIPC in its brief on the merits places exclusive reliance on a manipulation theory and is completely silent about the alleged parking scheme.

[20] As we said in *Associated General Contractors*, "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." 459 U. S., at 536

allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets. Assuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages. Finally, the law would be shouldering these difficulties despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication. As noted above, the broker-dealers have in fact sued in this case, in the persons of their SIPA trustees appointed on account of their insolvency.[21]

(footnote omitted). Thus, our use of the term "direct" should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text. We do not necessarily use it in the same sense as courts before us have and intimate no opinion on results they reached. See, *e. g.*, *Sedima*, 473 U. S., at 497, n. 15; *id.*, at 522 (Marshall, J., dissenting); *Pelletier*, 921 F. 2d, at 1499–1500; *Ocean Energy*, *supra*.

[21] If the trustees had not brought suit, SIPC likely could have forced their hands. To the extent consistent with SIPA, bankruptcy principles apply to liquidations under that statute. See § 78fff(b); see also § 78fff–1(b) (to extent consistent with SIPA, SIPA trustee has same duties as trustee under Chapter 7 of Bankruptcy Code); § 78eee(b)(2)(A)(iii) (to extent consistent with SIPA, court supervising SIPA liquidation has same powers and duties as bankruptcy court). And, it is generally held that a creditor can, by petitioning the bankruptcy court for an order to that effect, compel the trustee to institute suit against a third party. See *In re Automated Business Systems, Inc.*, 642 F. 2d 200, 201 (CA6 1981). As a practical matter, it is very unlikely that SIPC will have to petition a court for such an order, given its influence over SIPA trustees. See § 78eee(b)(3) (court must appoint as trustee "such perso[n] as SIPC, in its sole discretion, specifies," which in certain circumstances may be SIPC itself); § 78eee(b)(5)(C) (SIPC's recommendation to court on trustee's compensation is entitled to "considerable reliance" and is, under certain circumstances, binding).

Indeed, the insolvency of the victim directly injured adds a further concern to those already expressed, since a suit by an indirectly injured victim could be an attempt to circumvent the relative priority its claim would have in the directly injured victim's liquidation proceedings. See *Mid-State Fertilizer Co.* v. *Exchange National Bank of Chicago*, 877 F. 2d 1333, 1336 (CA7 1989).

As against the force of these considerations of history and policy, SIPC's reliance on the congressional admonition that RICO be "liberally construed to effectuate its remedial purposes," § 904(a), 84 Stat. 947, does not deflect our analysis. There is, for that matter, nothing illiberal in our construction: We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, are not proper plaintiffs. Indeed, we fear that RICO's remedial purposes would more probably be hobbled than helped by SIPC's version of liberal construction: Allowing suits by those injured only indirectly would open the door to "massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits." *Associated General Contractors*, 459 U. S., at 545.

In sum, subrogation to the rights of the manipulation conspiracy's secondary victims does, and should, run afoul of proximate-causation standards, and SIPC must wait on the outcome of the trustees' suit. If they recover from Holmes, SIPC may share according to the priority SIPA gives its claim. See 15 U. S. C. § 78fff–2(c).

B

SIPC also claims a statutory entitlement to pursue Holmes for funds advanced to the trustees for administering the liquidation proceedings. See Tr. of Oral Arg. 30. Its theory here apparently is not one of subrogation, to which the statute makes no reference in connection with SIPC's obligation

to make such advances. See 15 U. S. C. § 78fff–3(b)(2).[22] SIPC relies instead, see Brief for Respondent 37, and n. 180, on this SIPA provision:

> "SIPC participation—SIPC shall be deemed to be a party in interest as to all matters arising in a liquidation proceeding, with the right to be heard on all such matters, and shall be deemed to have intervened with respect to all such matters with the same force and effect as if a petition for such purpose had been allowed by the court." 15 U. S. C. § 78eee(d).

The language is inapposite to the issue here, however. On its face, it simply qualifies SIPC as a proper party in interest in any "matter arising in a liquidation proceeding" as to which it "shall be deemed to have intervened." By extending a right to be heard in a "matter" pending between other parties, however, the statute says nothing about the conditions necessary for SIPC's recovery as a plaintiff. How the provision could be read, either alone or with § 1964(c), to give SIPC a right to sue Holmes for money damages simply eludes us.

IV

Petitioner urges us to go further and decide whether every RICO plaintiff who sues under § 1964(c) and claims securities fraud as a predicate offense must have purchased or sold a security, an issue on which the Circuits appear divided.[23] We decline to do so. Given what we have said in Parts II

---

[22] To the extent that SIPC's unexplained remark at oral argument, see Tr. of Oral Arg. 29–30, could be understood to rest its claim for recovery of these advances on a theory of subrogation, it came too late. One looks in vain for any such argument in its brief.

[23] Compare 908 F. 2d, at 1465–1467 (no purchaser-seller rule under RICO); *Warner* v. *Alexander Grant & Co.*, 828 F. 2d 1528, 1530 (CA11 1987) (same), with *International Data Bank, Ltd.* v. *Zepkin*, 812 F. 2d 149, 151–154 (CA4 1987) (RICO plaintiff relying on securities fraud as predicate offense must have been purchaser or seller); *Brannan* v. *Eisenstein*, 804 F. 2d 1041, 1046 (CA8 1986) (same).

and III, our discussion of the issue would be unnecessary to the resolution of this case. Nor do we think that leaving this question unanswered will deprive the lower courts of much-needed guidance. A review of the conflicting cases shows that all could have been resolved on proximate-causation grounds, and that none involved litigants like those in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), persons who had decided to forgo securities transactions in reliance on misrepresentations. Thus, we think it inopportune to resolve the issue today.

V

We hold that, because the alleged conspiracy to manipulate did not proximately cause the injury claimed, SIPC's allegations and the record before us fail to make out a right to sue petitioner under § 1964(c). We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE STEVENS join, concurring in part and concurring in the judgment.

I agree with the Court that the civil action provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968 (1988 ed. and Supp. II), have a proximate cause element, and I can even be persuaded that the proximate cause issue is "fairly included" in the question on which we granted certiorari. *Ante*, at 266, n. 12. In my view, however, before deciding whether the Securities Investor Protection Corporation (SIPC) was proximately injured by petitioner's alleged activities, we should first consider the standing question that was decided below, and briefed and argued here, and which was the only clearly articulated question on which we granted certiorari. In resolving that question, I would hold

that a plaintiff need not be a purchaser or a seller to assert RICO claims predicated on violations of fraud in the sale of securities.

Section 10(b) of the Securities Exchange Act of 1934 (1934 Act) makes it unlawful for any person to use, "in connection with the purchase or sale of any security," any "manipulative or deceptive device or contrivance" in contravention of rules or regulations that the Securities and Exchange Commission (SEC) may prescribe. 15 U. S. C. § 78j(b). Pursuant to its authority under § 10(b), the SEC has adopted Rule 10b–5, which prohibits manipulative or deceptive acts "in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1991). In 1971, we ratified without discussion the "established" view that § 10(b) and Rule 10b–5 created an implied right of action. *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9. Four years later, in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), we confirmed the federal courts' "longstanding acceptance"[1] of the rule that a plaintiff must have actually purchased or sold the securities at issue in order to bring a Rule 10b–5 private damages action. *Id.*, at 733.

In this case, the District Court held that SIPC, which was neither a purchaser nor a seller of the allegedly manipulated securities, lacked standing to assert RICO claims predicated on alleged violations of § 10(b) and Rule 10b–5. App. to Pet. for Cert. 45a. The Court of Appeals reversed and held that *Blue Chip Stamps*' purchaser/seller limitation does not apply to suits brought under RICO. *Securities Investment Protection Corp.* v. *Vigman*, 908 F. 2d 1461 (CA9 1990). An ex-

[1] That acceptance was not universal. *E. g., Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654, 659 (CA7 1973) (holding that "the protection of [Rule 10b–5] extends to persons who, in their capacity as investors, suffer significant injury as a direct consequence of fraud in connection with a securities transaction, even though their participation in the transaction did not involve either the purchase or the sale of a security") (Stevens, J.).

amination of the text of RICO, and a comparison with the situation the Court confronted in *Blue Chip Stamps*, persuades me that the Court of Appeals' determination was correct. Because the Court's decision today leaves intact a division among the Circuits on whether *Blue Chip Stamps*' standing requirement applies in RICO suits,[2] I would affirm this portion of the decision below, even though we go on to hold that the alleged RICO violation did not proximately cause SIPC's injuries.

Our obvious starting point is the text of the statute under which SIPC sued. RICO makes it unlawful for any person who has engaged in a "pattern of racketeering activity" to invest, maintain an interest, or participate in an enterprise that is engaged in interstate or foreign commerce. 18 U. S. C. § 1962. "[R]acketeering activity" is defined to include a number of state and federal offenses, including any act indictable under 18 U. S. C. § 1341 (1988 ed., Supp. II) (mail fraud) or § 1343 (wire fraud), and "any offense involving . . . fraud in the sale of securities . . . punishable under any law of the United States." § 1961(1). RICO authorizes "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue for treble damages in federal court. § 1964(c).

RICO's civil suit provision, considered on its face, has no purchaser/seller standing requirement. The statute sweeps

---

[2] Compare *Securities Investment Protection Corp.* v. *Vigman*, 908 F. 2d 1461, 1465–1467 (CA9 1990) (purchaser/seller standing limitation does not apply to RICO claims predicated on acts of fraud in the sale of securities); *Warner* v. *Alexander Grant & Co.*, 828 F. 2d 1528, 1530 (CA11 1987) (same), with *International Data Bank, Ltd.* v. *Zepkin*, 812 F. 2d 149, 151–154 (CA4 1987) (standing to bring RICO action predicated on fraud in the sale of securities is limited to purchaser or seller of securities); *Brannan* v. *Eisenstein*, 804 F. 2d 1041, 1046 (CA8 1986) (same).

broadly, authorizing "*[a]ny* person" who is injured by reason of a RICO violation to sue. "[P]erson" is defined to include "*any* individual or entity capable of holding a legal or beneficial interest in property." § 1961(3) (emphasis added). "Insofar as 'any' encompasses 'all'," *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U. S. 211, 223 (1991), the words "any person" cannot reasonably be read to mean only purchasers and sellers of securities. As we have explained in rejecting previous efforts to narrow the scope of civil RICO: "If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962's] provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional . . . requirement." *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495 (1985).

Of course, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by [reason of] the conduct constituting the violation." *Id.*, at 496. We have already remarked that the requirement of injury in one's "business or property" limits the availability of RICO's civil remedies to those who have suffered injury in fact. *Id.*, at 497 (citing *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F. 2d 384, 398 (CA7 1984)). Today, the Court sensibly holds that the statutory words "by reason of" operate, as they do in the antitrust laws, to confine RICO's civil remedies to those whom the defendant has truly injured in some meaningful sense. Requiring a proximate relationship between the defendant's actions and the plaintiff's harm, however, cannot itself preclude a nonpurchaser or nonseller of securities, alleging predicate acts of fraud in the sale of securities, from bringing suit under § 1964(c). Although the words "injury in [one's] business or property" and "by reason of" are words of limitation, they do not categorically exclude non-

purchasers and nonsellers of securities from the universe of RICO plaintiffs.

Petitioner argues that the civil suit provisions of § 1964(c) are not as sweeping as they appear because § 1964(c) incorporates the standing requirements of the predicate acts alleged. But § 1964(c) focuses on the "injur[y]" of any "person," not the legal right to sue of any proper plaintiff for a predicate act. If standing were to be determined by reference to the predicate offenses, a private RICO plaintiff could not allege as predicates many of the acts that constitute the definition of racketeering activity. The great majority of acts listed in § 1961(1) are criminal offenses for which only a State or the Federal Government is the proper party to bring suit. In light of § 1964(c)'s provision that "any person" injured by reason of a RICO violation may sue, I would not accept that this same section envisions an overlay of standing requirements from the predicate acts, with the result that many RICO suits could be brought only by government entities.

Nor can I accept the contention that, even if § 1964(c) does not normally incorporate the standing requirements of the predicate acts, an exception should be made for "fraud in the sale of securities" simply because it is well established that a plaintiff in a civil action under § 10(b) and Rule 10b–5 must be either a purchaser or seller of securities. A careful reading of § 1961(1) reveals the flaw in this argument. The relevant predicate offense is "any offense involving . . . fraud in the sale of securities . . . punishable under any law of the United States." The embracing words "offense . . . punishable under any law of the United States" plainly signify the elements necessary to bring a criminal prosecution. See *Trane Co.* v. *O'Connor Securities*, 718 F. 2d 26, 29 (CA2 1983); *Dan River, Inc.* v. *Icahn*, 701 F. 2d 278, 291 (CA4 1983). To the extent that RICO's reference to an "offense involving fraud in the sale of securities" encompasses conduct that violates § 10(b), see *infra*, at 282–283, the relevant predicate is

defined not by § 10(b) itself, but rather by § 32(a) of the 1934 Act, 15 U. S. C. § 78ff(a), which authorizes criminal sanctions against any person who willfully violates the Act or rules promulgated thereunder. As we have previously made clear, the purchaser/seller standing requirement for private civil actions under § 10(b) and Rule 10b–5 is of no import in criminal prosecutions for willful violations of those provisions. *United States* v. *Naftalin*, 441 U. S. 768, 774, n. 6 (1979); *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 467, n. 9 (1969). Thus, even if Congress intended RICO's civil suit provision to subsume established civil standing requirements for predicate offenses, that situation is not presented here.

Although the civil suit provisions of § 1964(c) lack a purchaser/seller requirement, it is still possible that one lurks in § 1961(1)'s catalog of predicate acts; *i. e.*, it is possible that § 1961(1) of its own force limits RICO standing to the actual parties to a sale. As noted above, the statute defines "racketeering activity" to include "any offense involving . . . fraud in the sale of securities . . . punishable under any law of the United States." Unfortunately, the term "fraud in the sale of securities" is not further defined. "[A]ny offense . . . punishable under any law of the United States" presumably means that Congress intended to refer to the federal securities laws and not common-law tort actions for fraud. Unlike most of the predicate offenses listed in § 1961(1), however, there is no cross-reference to any specific sections of the United States Code. Nor is resort to the legislative history helpful in clarifying what kinds of securities violations Congress contemplated would be covered. See generally Bridges, Private RICO Litigation Based Upon "Fraud in the Sale of Securities," 18 Ga. L. Rev. 43, 58–59 (1983) (discussing paucity of legislative history); Note, RICO and Securities Fraud: A Workable Limitation, 83 Colum. L. Rev. 1513, 1536–1539 (1983) (reviewing testimony before Senate Judiciary Committee).

Which violations of the federal securities laws, if any, constitute a "fraud in the sale of securities" within the meaning of § 1961(1) is a question that has generated much ink and little agreement among courts[3] or commentators,[4] and one

---

[3] Compare *First Pacific Bancorp, Inc. v. Bro*, 847 F. 2d 542, 546 (CA9 1988) (violations of §§ 13(d) and 14(e) of the 1934 Act cannot be RICO predicate offenses because neither provision embraces fraud "in the sale" of a security); *In re Par Pharmaceutical, Inc. Securities Litigation*, 733 F. Supp. 668 (SDNY 1990) (violation of § 10(b) and Rule 10b–5 involving fraud in connection with the purchase of securities cannot be a predicate offense), with *In re Catanella and E. F. Hutton & Co. Securities Litigation*, 583 F. Supp. 1388, 1425, n. 56 (ED Pa. 1984) (reach of RICO claims predicated on violations of § 10b and Rule 10b–5 encompasses "both purchases and sales"); *Lou* v. *Belzberg*, 728 F. Supp. 1010, 1026 (SDNY 1990) (violation of Hart-Scott-Rodino reporting requirement relates to "fraud in the sale of securities" and may constitute a RICO predicate act); *Spencer Cos.* v. *Agency Rent-A-Car, Inc.*, 1981–1982 CCH Fed. Sec. L. Rep. ¶ 98,361, p. 92,215 (Mass. 1981) (violation of § 13(d) reporting requirements is RICO predicate act because "[t]he remedial purpose of the statute would appear to encompass fraud committed by the purchaser of securities, as well as by the seller").

[4] See, *e. g.*, Bridges, Private RICO Litigation Based Upon "Fraud in the Sale of Securities," 18 Ga. L. Rev. 43, 81 (1983) ("fraud in the sale of securities" encompasses any violation of a specific antifraud or antimanipulation provision of the securities laws and regulations or use of stolen or counterfeit securities, as long as violation is by means of an actual sale of securities); Johnson, Predators Rights: Multiple Remedies for Wall Street Sharks Under the Securities Laws and RICO, 10 J. Corp. L. 3, 39–40 (1984) (allegations of violations of antifraud provisions of the federal securities laws should satisfy "fraud in the sale of securities" definition); Long, Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action, 85 Dick. L. Rev. 201, 225–226 (1981) (any violation of federal securities laws other than reporting or "housekeeping" measures suffices to assert predicate act of "fraud in the sale of securities"); MacIntosh, Racketeer Influenced and Corrupt Organizations Act: Powerful New Tool of the Defrauded Securities Plaintiff, 31 Kan. L. Rev. 7, 30–37 (1982) ("fraud in the sale of securities" is both broader and narrower than antifraud provisions of securities laws); Mathews, Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation, 65 Notre Dame L. Rev. 896, 944–947 (1990) (securities fraud is a predicate offense only if fraud

which we need not definitively resolve here. The statute unmistakably requires that there be fraud, sufficiently willful to constitute a criminal violation, and that there be a sale of securities. At the same time, however, I am persuaded that Congress' use of the word "sale" in defining the predicate offense does not *necessarily* dictate that a RICO plaintiff have been a party to an executed sale.

Section 1961(1)'s list of racketeering offenses provides the RICO predicates for both criminal prosecutions and civil actions. Obviously there is no requirement that the Government be party to a sale before it can bring a RICO prosecution predicated on "fraud in the sale of securities." Accordingly, any argument that the offense itself embodies a standing requirement must apply only to private actions. That distinction is not tenable, however. By including a private right of action in RICO, Congress intended to bring "the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources [were] deemed inadequate." *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 151 (1987). Although not everyone can qualify as an appropriate "private attorney general," the prerequisites to the role are articulated, not in the definition of the predicate act, but in the civil action provisions of § 1964(c)—a plaintiff must allege "injur[y] in his business or property by reason of" a RICO violation.

Construing RICO's reference to "fraud in the sale of securities" to limit standing to purchasers and sellers would be

---

occurs in actual sale of a security); Tyson & August, The Williams Act After RICO: Has the Balance Tipped in Favor of Incumbent Management?, 35 Hastings L. J. 53, 79–80 (1983) (criminal violations of antifraud provisions of the securities laws should constitute racketeering activity, provided that the conduct is in connection with purchase or sale of securities); Note, Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations, 8 J. Corp. L. 411, 430–431 (1983) ("fraud in the sale of securities" applies to fraudulent purchase as well as fraudulent sale of securities).

in tension with our reasoning in *Blue Chip Stamps*. In that case, the Court admitted that it was not "able to divine from the language of § 10(b) the express 'intent of Congress' as to the contours of a private cause of action under Rule 10b–5." 421 U. S., at 737. The purchaser/seller standing limitation in Rule 10b–5 damages actions thus does not stem from a construction of the phrase "in connection with the purchase or sale of any security." Rather, it rests on the relationship between § 10(b) and other provisions of the securities laws, *id.*, at 733–736, and the practical difficulties in granting standing in the absence of an executed transaction, *id.*, at 737–749, neither of which are relevant in the RICO context.

Arguably, even if § 10(b)'s reference to fraud "*in connection with*" the sale of a security is insufficient to limit the plaintiff class to purchasers and sellers, § 1961(1)'s reference to fraud "*in*" the sale of a security performs just such a narrowing function. But we have previously had occasion to express reservations on the validity of that distinction. In *United States* v. *Naftalin*, 441 U. S. 768 (1979), we reinstated the conviction of a professional investor who engaged in fraudulent "short selling" by placing orders with brokers to sell shares of stock which he falsely represented that he owned. This Court agreed with the District Court that Naftalin was guilty of fraud "in" the "offer" or "sale" of securities in violation of § 17(a)(1) of the Securities Act of 1933, 15 U. S. C. § 77q(a)(1), even though the fraud was perpetrated on the brokers, not their purchasing clients. The Court noted:

> "[Naftalin] contends that the requirement that the fraud be 'in' the offer or sale connotes a narrower range of activities than does the phrase 'in connection with,' which is found in § 10(b) . . . . First, we are not necessarily persuaded that 'in' is narrower than 'in connection with.' Both Congress, see H. R. Rep. No. 85, 73d Cong., 1st Sess., 6 (1933), and this Court, see *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 10

(1971), have on occasion used the terms interchangeably. But even if 'in' were meant to connote a narrower group of transactions than 'in connection with,' there is nothing to indicate that 'in' is narrower in the sense insisted upon by Naftalin." 441 U. S., at 773, n. 4.

So also in today's case. To the extent that there is a meaningful difference between Congress' choice of "in" as opposed to "in connection with," I do not view it as limiting the class of RICO plaintiffs to those who were parties to a sale. Rather, consistent with today's decision, I view it as confining the class of defendants to those proximately responsible for the plaintiff's injury and excluding those only tangentially "connect[ed] with" it.

In *Blue Chip Stamps*, we adopted the purchaser/seller standing limitation in § 10(b) cases as a prudential means of avoiding the problems of proof when no security was traded and the nuisance potential of vexatious litigation. 421 U. S., at 738–739. In that case, however, we were confronted with limiting access to a private cause of action that was judicially implied. We expressly acknowledged that "if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability." *Id.*, at 748. To be sure, the problems of expansive standing identified in *Blue Chip Stamps* are exacerbated in RICO. In addition to the threat of treble damages, a defendant faces the stigma of being labeled a "racketeer." Nonetheless, Congress *has* legislated the elements of a private cause of action under RICO. Specifically, Congress has authorized "*[a]ny* person injured in his business or property by reason of" a RICO violation to bring suit under §1964(c). Despite the very real specter of vexatious litigation based on speculative damages, it is within Congress' power to create a private right of ac-

tion for plaintiffs who have neither bought nor sold securities. For the reasons stated above, I think Congress has done so. "That being the case, the courts are without authority to restrict the application of the statute." *United States* v. *Turkette*, 452 U. S. 576, 587 (1981).

In sum, we granted certiorari to resolve a split among the Circuits as to whether a nonpurchaser or nonseller of securities could assert RICO claims predicated on violations of § 10(b) and Rule 10b–5. See cases cited n. 1, *supra*. I recognize that, like the case below, some of those decisions might have been more appropriately cast in terms of proximate causation. That we have now more clearly articulated the causation element of a civil RICO action does not change the fact that the governing precedent in several Circuits is in disagreement as to *Blue Chip Stamps*' applicability in the RICO context. Because that issue was decided below and fully addressed here, we should resolve it today. I would sustain the Court of Appeals' determination that RICO plaintiffs alleging predicate acts of fraud in the sale of securities need not be actual purchasers or sellers of the securities at issue. Accordingly, I join all of the Court's opinion except Part IV.

JUSTICE SCALIA, concurring in the judgment.

I agree with JUSTICE O'CONNOR that in deciding this case we ought to reach, rather than avoid, the question on which we granted certiorari. I also agree with her on the answer to that question: that the purchaser-seller rule does not apply in civil RICO cases alleging as predicate acts violations of Securities and Exchange Commission Rule 10b–5, 17 CFR § 240.10b–5 (1991). My reasons for that conclusion, however, are somewhat different from hers.

The ultimate question here is statutory standing: whether the so-called *nexus* (mandatory legalese for "connection") between the harm of which this plaintiff complains and the defendant's so-called predicate acts is of the sort that will sup-

port an action under civil RICO. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 497 (1985). One of the usual elements of statutory standing is proximate causality. It is required in RICO not so much because RICO has language similar to that of the Clayton Act, which in turn has language similar to that of the Sherman Act, which, by the time the Clayton Act had been passed, had been interpreted to include a proximate-cause requirement; but rather, I think, because it has always been the practice of common-law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct. Life is too short to pursue every human act to its most remote consequences; "for want of a nail, a kingdom was lost" is a commentary on fate, not the statement of a major cause of action against a blacksmith. See *Associated General Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 536 (1983).

Yet another element of statutory standing is compliance with what I shall call the "zone-of-interests" test, which seeks to determine whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefited by the provision at issue.* Judicial inference of a zone-of-interests requirement, like judicial inference of a proximate-cause requirement, is a background practice against which Congress legislates. See *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345–348 (1984). Sometimes considerable limitations upon the zone of interests are set forth explicitly in the statute itself—but rarely, if ever, are those limitations so complete that they are

---

*My terminology may not be entirely orthodox. It may be that proximate causality is *itself* an element of the zone-of-interests test as that phrase has ordinarily been used, see, *e. g.*, *Wyoming* v. *Oklahoma*, 502 U. S. 437, 473 (1992) (SCALIA, J., dissenting), but that usage would leave us bereft of terminology to connote those aspects of the "violation-injury connection" aspect of standing that are distinct from proximate causality.

deemed to preclude the judicial inference of others. If, for example, a securities fraud statute specifically conferred a cause of action upon "all purchasers, sellers, or owners of stock injured by securities fraud," I doubt whether a stockholder who suffered a heart attack upon reading a false earnings report could recover his medical expenses. So also here. The phrase "any person injured in his business or property by reason of" the unlawful activities makes clear that the zone of interests does not extend *beyond* those injured in that respect—but does not necessarily mean that it includes *all* those injured in that respect. Just as the phrase does not exclude normal judicial inference of proximate cause, so also it does not exclude normal judicial inference of zone of interests.

It seems to me obvious that the proximate-cause test and the zone-of-interests test that will be applied to the various causes of action created by 18 U. S. C. § 1964 are not uniform, but vary according to the nature of the criminal offenses upon which those causes of action are based. The degree of proximate causality required to recover damages caused by predicate acts of sports bribery, for example, see 18 U. S. C. § 224, will be quite different from the degree required for damages caused by predicate acts of transporting stolen property, see 18 U. S. C. §§ 2314–2315. And so also with the applicable zone-of-interests test: It will vary with the underlying violation. (Where the predicate acts consist of different criminal offenses, presumably the plaintiff would have to be within the degree of proximate causality and within the zone of interests as to all of them.)

It also seems to me obvious that unless some reason for making a distinction exists, the background zone-of-interests test applied to one cause of action for harm caused by violation of a particular criminal provision should be the same as the test applied to another cause of action for harm caused by violation of the same provision. It is principally in this respect that I differ from JUSTICE O'CONNOR's analysis,

ante, at 280 (opinion concurring in part and concurring in judgment). If, for example, one statute gives persons injured by a particular criminal violation a cause of action for damages, and another statute gives them a cause of action for equitable relief, the persons coming within the zone of interests of those two statutes would be identical. Hence the relevance to this case of our decision in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975). The predicate acts of securities fraud alleged here are violations of Rule 10b–5; and we held in *Blue Chip Stamps* that the zone of interests for civil damages attributable to violation of that provision does not include persons who are not purchasers or sellers. As I have described above, just as RICO's statutory phrase "injured in his business or property by reason of" does not extend the rule of proximate causation otherwise applied to congressionally created causes of action, so also it should not extend the otherwise applicable rule of zone of interests.

What prevents that proposition from being determinative here, however, is the fact that *Blue Chip Stamps* did not involve application of the background zone-of-interests rule to a congressionally created Rule 10b–5 action, but rather specification of the contours of a Rule 10b–5 action "implied" (*i. e.*, created) by the Court itself—a practice we have since happily abandoned, see, *e. g.*, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568–571, 575–576 (1979). The policies that we identified in *Blue Chip Stamps*, *supra*, as supporting the purchaser-seller limitation (namely, the difficulty of assessing the truth of others' claims, see *id.*, at 743–747, and the high threat of "strike" or nuisance suits in securities litigation, see *id.*, at 740–741) are perhaps among the factors properly taken into account in determining the zone of interests covered by a statute, but they are surely not alone enough to restrict standing to purchasers or sellers under a text that contains no hint of such a limitation. I think, in other words, that the limitation we approved in *Blue Chip Stamps* was essentially a legislative judgment rather than an

interpretive one. Cf. *Franklin* v. *Gwinnett County Public Schools*, *ante*, at 77 (SCALIA, J., concurring in judgment). It goes beyond the customary leeway that the zone-of-interests test leaves to courts in the construction of statutory texts.

In my view, therefore, the Court of Appeals correctly rejected the assertion that SIPC had no standing because it was not a purchaser or seller of the securities in question. A proximate-cause requirement also applied, however, and I agree with the Court that that was not met. For these reasons, I concur in the judgment.

Syllabus

UNITED STATES *v.* R. L. C.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90–1577. Argued December 10, 1991—Decided March 24, 1992

Because certain conduct of respondent R. L. C. at age 16 would have constituted the crime of involuntary manslaughter under 18 U. S. C. §§ 1112(a) and 1153 if committed by an adult, the District Court held that he had committed an act of juvenile delinquency within the meaning of the Juvenile Delinquency Act. In light of a provision of that Act requiring the length of official detention in certain circumstances to be limited to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," § 5037(c)(1)(B), the court committed R. L. C. to detention for three years, the maximum sentence for involuntary manslaughter under § 1112(b). Reading § 5037(c)(1)(B) to bar a juvenile term longer than the sentence a court could impose on a similarly situated adult after applying the United States Sentencing Guidelines, and finding that the Guidelines would yield a maximum sentence of 21 months for an adult in R. L. C.'s circumstances, the Court of Appeals vacated his sentence and remanded for resentencing.

Held: The judgment is affirmed.

915 F. 2d 320, affirmed.

JUSTICE SOUTER delivered the opinion of the Court with respect to Parts I, II–A, and III, concluding:

1. Plain-meaning analysis does not compel adoption of the Government's construction that the word "authorized" in § 5037(c)(1)(B) must refer to the maximum term of imprisonment provided for by the statute defining the offense. At least equally consistent, and arguably more natural, is the construction that "authorized" refers to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power, including § 3553(b), which requires application of the Guidelines and caps an adult sentence at the top of the relevant Guideline range, absent circumstances warranting departure. Thus, the most that can be said from examining the text in its present form is that the Government may claim its preferred construction to be one possible resolution of statutory ambiguity. Pp. 297–298.

Syllabus

2. The § 5037(c)(1)(B) limitation refers to the maximum sentence that could be imposed if the juvenile were being sentenced after application of the Guidelines. Although determining the maximum permissible sentence under § 5037(c)(1)(B) will require sentencing and reviewing courts to determine an appropriate Guideline range in juvenile-delinquency proceedings, it does not require plenary application of the Guidelines to juvenile delinquents. Where the statutory provision applies, a sentencing court's concern with the Guidelines goes solely to the upper limit of the proper Guideline range as setting the maximum term for which a juvenile may be committed to official detention, absent circumstances that would warrant departure under § 3553(b). Pp. 306–307.

JUSTICE SOUTER, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS, delivered an opinion with respect to Parts II–B and II–C, concluding that:

1. The textual evolution of § 5037(c)(1)(B) and the relevant legislative history reinforce the conclusion that the section is better understood to refer to the maximum sentence permitted under § 3553(b). Whereas the predecessor of § 5037(c) spoke in terms of the "maximum term which could have been imposed on *an adult*" (emphasis added), the current version's reference to "the juvenile," on its face suggests a change in reference from abstract considerations to a focused inquiry into the circumstances of the particular juvenile. Although an intervening version referred to the maximum sentence "that would be authorized *by section 3581(b)* if the juvenile had been tried and convicted as an adult" (emphasis added), the emphasized language was quickly deleted, resulting in the present statutory text. The legislative history demonstrates that Congress intended the deletion to conform juvenile and adult maximum sentences, in that § 3581(b), which catalogs such sentences for federal offenses by reference to their relative seriousness, could in some circumstances have appeared to authorize a longer sentence for a juvenile than an adult would have received. Absent promulgation of the Guidelines, the deletion might have left the question of the "authorized" maximum to be determined by reference to the penalty provided by the statute creating the offense. However, Congress' purpose today can be achieved only by reading "authorized" to refer to the maximum sentence that may be imposed consistently with § 3553(b), which will generally provide a ceiling more favorable to the juvenile than that contained in the offense-defining statute. It hardly seems likely that Congress adopted the current § 5037(c) without intending the recently enacted Guidelines scheme to be considered for the purpose of conforming juvenile and adult sentences. Pp. 298–305.

Syllabus

2. No ambiguity about the statute's intended scope survives the foregoing analysis, but, if any did, the construction yielding the shorter sentence would be chosen under the rule of lenity. That rule's application is unnecessary in this case, however, since this Court has "always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal* v. *United States*, 498 U. S. 103, 108 (citation omitted). Pp. 305–306.

JUSTICE SCALIA, joined by JUSTICE KENNEDY and JUSTICE THOMAS, concluded that it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history. Once it is determined that the statutory text is ambiguous, the rule requires that the more lenient interpretation prevail. In approving reliance on a statute's "motivating policies," *Moskal* v. *United States*, 498 U. S. 103, 108, seems contrary to *Hughey* v. *United States*, 495 U. S. 411, 422. And insofar as *Moskal* requires consideration of legislative history at all, it compromises the purposes of the lenity rule: to assure that criminal statutes provide fair warning of what conduct is rendered illegal, see, *e. g.*, *McBoyle* v. *United States*, 283 U. S. 25, 27, and to assure that society, through its representatives, has genuinely called for the punishment to be meted out, see, *e. g.*, *United States* v. *Bass*, 404 U. S. 336, 348. While the Court has considered legislative history in construing criminal statutes before, it appears that only one case, *Dixson* v. *United States*, 465 U. S. 482, has relied on legislative history to "clarify" an ambiguous statute against a criminal defendant's interest. *Dixson* does not discuss the implications of its decision, and both of the cases it cites in supposed support of its holding found the statute at hand *not* to be facially ambiguous. Pp. 307–311.

JUSTICE THOMAS agreed with JUSTICE SCALIA that the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity. The rule operates, however, only if ambiguity remains even after a court has applied established principles of construction to the statutory text. See, *e. g.*, *Chapman* v. *United States*, 500 U. S. 453, 463. Although knowledge of these principles is imputed to the citizenry, there appears scant justification for also requiring knowledge of extralegal materials such as legislative history. Pp. 311–312.

SOUTER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and III, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined, and an opinion with respect to Parts II–B and II–C, in which

REHNQUIST, C. J., and WHITE and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 307. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 311. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 312.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Bryson.*

Katherian D. Roe argued the cause for respondent. With her on the brief were *Daniel M. Scott*, *Scott F. Tilsen*, and *Andrew H. Mohring.*

JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and III, and an opinion with respect to Parts II–B and II–C, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS join.

The provisions of the Juvenile Delinquency Act require the length of official detention in certain circumstances to be limited to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." 18 U. S. C. § 5037(c)(1)(B). We hold that this limitation refers to the maximum sentence that could be imposed if the juvenile were being sentenced after application of the United States Sentencing Guidelines.

I

Early in the morning of November 5, 1989, after a night of drinking, the then-16-year-old respondent R. L. C. and another juvenile stole a car with which they struck another automobile, fatally injuring one of its passengers, 2-year-old La Tesha Mountain. R. L. C. is a member of the Red Lake Band of Chippewa Indians, and these events took place on the Red Lake Indian Reservation, which is within Indian

country as defined by federal law. These circumstances provide federal jurisdiction in this case. See 18 U. S. C. §§ 1151, 1162, 1153. Upon certifying that a proceeding was authorized in federal court under § 5032 on the ground that no state court had jurisdiction over the offense, the Government charged R. L. C. with an act of juvenile delinquency.

After a bench trial, the District Court found R. L. C. to be a juvenile who had driven a car recklessly while intoxicated and without the owner's authorization, causing Mountain's death. R. L. C. was held to have committed an act of juvenile delinquency within the meaning of § 5031, since his acts would have been the crime of involuntary manslaughter in violation of §§ 1112(a) and 1153 if committed by an adult. The maximum sentence for involuntary manslaughter under 18 U. S. C. § 1112(b) is three years. At R. L. C.'s dispositional hearing, the District Court granted the Government's request to impose the maximum penalty for respondent's delinquency and accordingly committed him to official detention for three years.

Despite the manslaughter statute's provision for an adult sentence of that length, the United States Court of Appeals for the Eighth Circuit vacated R. L. C.'s sentence and remanded for resentencing, after concluding that 36 months exceeded the cap imposed by § 5037(c)(1)(B) upon the period of detention to which a juvenile delinquent may be sentenced. 915 F. 2d 320 (1990). Although the statute merely provides that juvenile detention may not extend beyond "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult,"[1] the

---

[1] Title 18 U. S. C. § 5037(c) provides:

"(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

Court of Appeals read this language to bar a juvenile term longer than the sentence a court could have imposed on a similarly situated adult after applying the United States Sentencing Guidelines. Under the Guidelines, involuntary manslaughter caused by recklessness has a base offense level of 14. United States Sentencing Commission, Guidelines Manual §2A1.4(a)(2) (Nov. 1991). The court found, and the Government agrees, see Brief for United States 22, n. 5, that because R. L. C. had the lowest possible criminal history level, Category I, the Guidelines would yield a sentencing range of 15–21 months for a similarly situated adult. The Court of Appeals therefore concluded that the maximum period of detention to which R. L. C. could be sentenced was 21 months.

The Government sought no stay of mandate from the Court of Appeals, and on remand the District Court imposed detention for 18 months. Although R. L. C. has now served this time, his failure to complete the 3-year detention originally imposed and the possibility that the remainder of it could be imposed saves the case from mootness. See *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 581, n. 2 (1983). We granted the Government's petition for certiorari, 501 U. S. 1230 (1991), to resolve the conflict between the Eighth Circuit's holding in this case and the Ninth Circuit's position, adopted in *United States* v. *Marco L.*, 868 F. 2d 1121,

---

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old—

"(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

"(B) in any other case beyond the lesser of—

"(i) three years; or

"(ii) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult."

cert. denied, 493 U. S. 956 (1989), and endorsed by the Government.

II

A

The Government suggests a straightforward enquiry into plain meaning to explain what is "authorized." It argues that the word "authorized" must mean the maximum term of imprisonment provided for by the statute defining the offense, since only Congress can "authorize" a term of imprisonment in punishment for a crime. As against the position that the Sentencing Guidelines now circumscribe a trial court's authority, the Government insists that our concern must be with the affirmative authority for imposing a sentence, which necessarily stems from statutory law. It maintains that in any event the Sentencing Commission's congressional authorization to establish sentencing guidelines does not create affirmative authority to set punishments for crime, and that the Guidelines do not purport to authorize the punishments to which they relate.

But this is too easy. The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory. See 18 U. S. C. § 3553(b). More significantly, the Government's argument that "authorization" refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate, seems to us to beg the question. Of course it is true that no penalty would be "authorized" without a statute providing specifically for the penal consequences of defined criminal activity. The question, however, is whether Congress intended the courts to treat the upper limit of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult case would bar imposition up to the limit, and an unwarranted upward de-

parture from the proper Guideline range would be reversible error. § 3742. Here it suffices to say that the Government's construction is by no means plain. The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power. This, indeed, is arguably the more natural construction.

Plain-meaning analysis does not, then, provide the Government with a favorable answer. The most that can be said from examining the text in its present form is that the Government may claim its preferred construction to be one possible resolution of statutory ambiguity.

B

On the assumption that ambiguity exists, we turn to examine the textual evolution of the limitation in question and the legislative history that may explain or elucidate it.[2] The

[2] R. L. C. argues that the broader statutory purpose supports his position. He contends that longer juvenile sentences are only justified by a rehabilitative purpose. See, *e. g.*, *Carter* v. *United States*, 113 U. S. App. D. C. 123, 125, 306 F. 2d 283, 285 (1962) (imposing a longer juvenile sentence under the now-repealed Youth Corrections Act) ("[R]ehabilitation may be regarded as comprising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison"). He then suggests that the Sentencing Reform Act rejected the rehabilitative model not merely for adult imprisonment, see *Mistretta* v. *United States*, 488 U. S. 361, 366–367 (1989), but for juveniles as well. See Brief for Respondent 19. While it is true that some rehabilitative tools were removed from the juvenile penalty scheme in 1984, see Pub. L. 98–473, § 214(b), 98 Stat. 2014 (abolishing parole for juvenile delinquents), the Juvenile Delinquency Act does not completely reject rehabilitative objectives. See, *e. g.*, 18 U. S. C. §§ 5035, 5039. We do not think a broader congressional purpose points clearly in either party's direction.

predecessor of § 5037(c) as included in the Juvenile Justice and Delinquency Prevention Act of 1974 provided that a juvenile adjudged delinquent could be committed to the custody of the Attorney General for a period "not [to] extend beyond the juvenile's twenty-first birthday or the maximum term which could have been imposed on *an adult* convicted of the same offense, whichever is sooner." 18 U. S. C. § 5037(b) (1982 ed.) (emphasis added). In its current form, the statute refers to the "maximum term of imprisonment that would be authorized if *the juvenile* had been tried and convicted as an adult." 18 U. S. C. § 5037(c) (emphasis added). On its face, the current language suggests a change in reference from abstract consideration of the penalty permitted in punishment of the adult offense, to a focused enquiry into the maximum that would be available in the circumstances of the particular juvenile before the court. The intervening history supports this reading.

With the Sentencing Reform Act of 1984 (chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, § 214(a), 98 Stat. 2013), § 5037 was rewritten. As § 5037(c)(1)(B), its relevant provision became "the maximum term of imprisonment that would be authorized *by section 3581(b)* if the juvenile had been tried and convicted as an adult." 18 U. S. C. §§ 5037(c)(1)(B), (c)(2)(B)(ii) (1982 ed., Supp. II) (emphasis added). The emphasized language was quickly deleted, however, by the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. 99–646, § 21(a)(2), 100 Stat. 3596 (Technical Amendments Act), resulting in the present statutory text, "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." It thus lost the reference to § 3581(b), which would have guided the sentencing court in identifying the "authorized" term of imprisonment.

R. L. C. argues that this loss is highly significant. Section 3581(b)[3] was, and still is, part of a classification system adopted in 1984 for use in setting the incidents of punishment for federal offenses by reference to letter grades reflecting their relative seriousness. One provision, for example, sets the maximum period of supervised release for each letter grade. § 3583. Section 3581(b) sets out the maximum term of imprisonment for each letter grade, providing, for instance, that the authorized term of imprisonment for a class C felony is not more than 12 years, for a class D not more than 6, and for a class E not more than 3.

The deletion of the reference to § 3581(b) with its specific catalog of statutory maximums would seem to go against the Government's position. Since, for example, a juvenile who had committed what would have been an adult class E felony would apparently have been subject to three years of detention, because § 3581(b) "authorized" up to three years of imprisonment for an adult, the deletion of the reference to § 3581(b) would appear to indicate some congressional intent to broaden the range of enquiry when determining what was authorized.[4]

The Government, however, finds a different purpose, disclosed in the section-by-section analysis prepared by the De-

---

[3] "(b) AUTHORIZED TERMS.—The authorized terms of imprisonment are—

"(1) for a Class A felony, the duration of the defendant's life or any period of time;

"(2) for a Class B felony, not more than twenty-five years;

"(3) for a Class C felony, not more than twelve years;

"(4) for a Class D felony, not more than six years;

"(5) for a Class E felony, not more than three years;

"(6) for a Class A misdemeanor, not more than one year;

"(7) for a Class B misdemeanor, not more than six months;

"(8) for a Class C misdemeanor, not more than thirty days; and

"(9) for an infraction, not more than five days." 18 U. S. C. § 3581.

[4] We speak here of an indication appearing solely from the face of the text. In fact, so far as we can tell, at the time of the amendment no federal statute defining an offense referred to it by letter grade.

partment of Justice to accompany the bill that became the Technical Amendments Act. The Department's analysis included this explanation for the proposal to delete the reference to §3581(b): "Because of the effect of 18 U. S. C. §3559(b)(2), deleting the reference to 18 U. S. C. §3581(b) will tie the maximum sentences for juveniles to the maximum for adults, rather than making juvenile sentences more severe than adult sentences." 131 Cong. Rec. 14177 (1985). Congress had enacted §3559 to reconcile the new sentencing schedule, providing for the incidents of conviction according to the offense's assigned letter grade, with the pre-existing body of federal criminal statutes, which of course included no assignments of letter grades to the particular offenses they created. Section 3559(a) provides a formula for assigning the missing letter based on the maximum term of imprisonment set by the statute creating the offense. Thus, as it stood at the time of the Technical Amendments Act, it read:

"(a) Classification

"An offense that is not specifically classified by a letter grade in the section defining it, is classified—

"(1) if the maximum term of imprisonment authorized is—

"(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

"(B) twenty years or more, as a Class B felony;

"(C) less than twenty years but ten or more years, as a Class C felony;

"(D) less than ten years but five or more years, as a Class D felony;

"(E) less than five years but more than one year, as a Class E felony;

"(F) one year or less but more than six months, as a Class A misdemeanor;

"(G) six months or less but more than thirty days, as a Class B misdemeanor;

"(H) thirty days or less but more than five days, as a Class C misdemeanor; or

"(I) five days or less, or if no imprisonment is authorized, as an infraction.

"(b) Effect of classification

"An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

"(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

"(2) the maximum term of imprisonment is the term authorized by the statute describing the offense." 18 U. S. C. § 3559 (1982 ed., Supp. II).

The Government explains that limiting the length of a juvenile detention to that authorized for an adult under § 3581(b) could in some circumstances have appeared to authorize a longer sentence than an adult could have received, when the offense involved was assigned no letter grade in its defining statute. Thus an offense created without letter grade and carrying a maximum term of two years would be treated under § 3559(a) as a class E felony. Section 3581(b) provides that a class E felony carried a maximum of three years. Regardless of that classification, § 3559(b)(2) would certainly preclude sentencing any adult offender to more than two years. Tension would arise, however, where a juvenile had committed the act constituting the offense. Insofar as § 5037(c) capped the juvenile detention by reference to what was authorized for an adult, the maximum would have been two years; but insofar as it capped it by reference to what was authorized by § 3581(b), the limit might have appeared to be three. It was to break this tension, according to the Government, that the reference to § 3581(b) was deleted guaranteeing that no juvenile would be given detention longer than the maximum adult sentence authorized by the

statute creating the offense. The amendment also, the Government says, left the law clear in its reference to the statute creating the offense as the measure of an "authorized" sentence. This conclusion is said to be confirmed by a statement in the House Report that the amendment "delet[es an] incorrect cross-referenc[e]," H. R. Rep. No. 99–797, p. 21 (1986), which, the Government argues, "suggests that no substantive change was intended." Brief for United States 20, n. 4.

We agree with the Government's argument up to a point. A sentencing court could certainly have been confused by the reference to § 3581(b). A sentencing judge considering a juvenile defendant charged with an offense bearing no letter classification, and told to look for "the maximum term of imprisonment that would be authorized [according to letter grade] by section 3581(b)," would have turned first to § 3559(a) to obtain a letter classification. The court perhaps would have felt obliged to ignore the provision of § 3559(b) that "the maximum term of imprisonment is the term authorized by the statute describing the offense" in favor of a longer term provided for by the appropriate letter grade in § 3581(b). Indeed, the sentencing judge would have been faced with this puzzle in virtually every case, since the system of classifying by letter grades adopted in 1984 was only to be used in future legislation defining federal criminal offenses. See Brief for United States 16. No federal offense on the books at the time the Sentencing Reform Act of 1984 was adopted carried a letter grade in its defining statute, and Congress has used the device only rarely in the ensuing years.

Thus, while it included a reference to § 3581(b), § 5037(c) was ambiguous. This ambiguity was resolved by an amendment that, absent promulgation of the Guidelines, might have left the question of the "authorized" maximum term of imprisonment to be determined only by reference to the penalty provided by the statute creating the offense, whether

expressed as a term of years or simply by reference to letter grade. The legislative history does not prove, however, that Congress intended "authorized" to refer solely to the statute defining the offense despite the enactment of a statute requiring application of the Sentencing Guidelines, a provision that will generally provide a ceiling more favorable to the juvenile than that contained in the offense-defining statute.

Indeed, the contrary intent would seem the better inference. The Justice Department analysis of the Criminal Law and Procedure Technical Amendments Act of 1986, upon which the Government relies, went on to say that "deleting the reference to 18 U. S. C. § 3581(b) will tie the maximum sentences for juveniles to the maximum for adults, rather than making juvenile sentences more severe than adult sentences." 131 Cong. Rec. 14177 (1985). This is an expression of purpose that today can be achieved only by reading "authorized" to refer to the maximum period of imprisonment that may be imposed consistently with 18 U. S. C. § 3553(b). That statute provides that "[t]he court shall impose a sentence . . . within the range" established for the category of offense as set forth in the Guidelines, "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." § 3553(b).

The point is reinforced by other elements of the legislative history. The Senate Report accompanying the 1986 Technical Amendments Act states that the amendment "makes clear that juvenile sentences are to be of equal length as those for adult offenders committing the same crime." S. Rep. No. 99–278, p. 3 (1986). This, in turn, reflects the statement in the Senate Report accompanying the Sentencing Reform Act, that the changes in juvenile sentencing law were included "in order to conform it to the changes made in adult sentencing laws." S. Rep. No. 98–225, p. 155 (1983).

The most fundamental of the Sentencing Reform Act's changes was, of course, the creation of the Sentencing Commission, authorized to promulgate the guidelines required for use by sentencing courts. It hardly seems likely that Congress adopted the current § 5037(c) with a purpose to conform juvenile and adult maximum sentences without intending the recently authorized Guidelines scheme to be considered for that purpose. The legislative history thus reinforces our initial conclusion that § 5037 is better understood to refer to the maximum sentence permitted under the statute requiring application of the Guidelines.[5]

C

We do not think any ambiguity survives. If any did, however, we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity, see, *e. g.*, *United States* v. *Bass*, 404 U. S. 336, 347–348 (1971), rooted in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should,'" *id.*, at 348 (quoting H. Friendly, Benchmarks 209 (1967)). While the rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing, see *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980), its application is unnecessary in this case, since "we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the

[5] The dissent takes us to task for reliance upon a "technical amendment." But a statute is a statute, whatever its label. Although the critical congressional enactment, the deletion of the reference to § 3581(b), came in the Technical Amendments Act, we have applied the usual tools of statutory construction: the language left in the statute after its amendment in 1986 is most naturally read to refer to the term of imprisonment authorized after application of the statute mandating use of the Guidelines. The legislative history of the Technical Amendments Act reinforces this conclusion.

statute." *Moskal* v. *United States*, 498 U. S. 103, 108 (1990) (citation omitted).[6]

III

We hold, therefore, that application of the language in § 5037(c)(1)(B) permitting detention for a period not to exceed "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" refers to the maximum length of sentence to which a similarly situated adult would be subject if convicted of the adult counterpart of the offense and sentenced under the statute requiring application of the Guidelines, § 3553(b). Although determining the maximum permissible sentence under § 5037(c)(1)(B) will therefore require sentencing and reviewing courts to determine an appropriate Guideline range in juvenile-delinquency proceedings, we emphasize

---

[6] JUSTICE SCALIA questions the soundness of *Moskal*'s statement that we have reserved lenity for those cases (unlike this one) in which after examining "the . . . structure, legislative history, and motivating policies," in addition to the text of an ambiguous criminal statute, we are still left with a reasonable doubt about the intended scope of the statute's application. But the Court has not in the past approached the use of lenity in the way JUSTICE SCALIA would have it.

It is true that the need for fair warning will make it "rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text," *Crandon* v. *United States*, 494 U. S. 152, 160 (1990), and that "general declarations of policy," whether in the text or the legislative history, will not support construction of an ambiguous criminal statute against the defendant, *Hughey* v. *United States*, 495 U. S. 411, 422 (1990). But lenity does not always require the "narrowest" construction, and our cases have recognized that a broader construction may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language. See *Dixson* v. *United States*, 465 U. S. 482, 500–501, n. 19 (1984). Cf. *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931) (a criminal statute should be construed in such a way that its language gives "fair warning" to the "common mind"). Whether lenity should be given the more immediate and dispositive role JUSTICE SCALIA espouses is an issue that is not raised and need not be reached in this case.

that it does not require plenary application of the Guidelines to juvenile delinquents.[7] Where that statutory provision applies, a sentencing court's concern with the Guidelines goes solely to the upper limit of the proper Guideline range as setting the maximum term for which a juvenile may be committed to official detention, absent circumstances that would warrant departure under § 3553(b).

The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

In my view it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history. Because JUSTICE SOUTER's opinion assumes the contrary, I join only Parts I, II–A, and III, and concur in the judgment.

The Court begins its analysis, quite properly, by examining the language of 18 U. S. C. § 5037(c)(1)(B)—which proves to be ambiguous. Reasonable doubt remains, the Court concludes, as to whether the provision refers (i) to the maximum punishment that could be imposed if the juvenile were being sentenced under the United States Sentencing Guidelines (15–21 months) or (ii) to the maximum punishment authorized by the statute defining the offense, see 18 U. S. C. § 1112(a) (36 months). *Ante*, at 298. With that conclusion I agree—and that conclusion should end the matter. The rule of lenity, in my view, prescribes the result when a criminal

---

[7] The Sentencing Guidelines, of course, do not directly apply to juvenile-delinquency proceedings. We observe that 28 U. S. C. § 995(a)(19), also enacted as part of the Sentencing Reform Act of 1984, gives the Sentencing Commission power to "study the feasibility of developing guidelines for the disposition of juvenile delinquents." The Government reports that the Sentencing Commission has recently begun such a study. See Brief for United States 11, n. 1.

statute is ambiguous: The more lenient interpretation must prevail.

Yet the plurality continues. Armed with its warrant of textual ambiguity, the plurality conducts a search of § 5037's legislative history to determine whether that clarifies the statute. Happily for *this* defendant, the plurality's extratextual inquiry is benign: It uncovers evidence that the "better understood" reading of § 5037 is the more lenient one. *Ante*, at 305. But this methodology contemplates as well a different ending, one in which something said in a Committee Report causes the criminal law to be stricter than the text of the law displays. According to the plurality, "'[W]e have always reserved [the rule of] lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to "the language and structure, legislative history, and motivating policies" of the statute.'" *Ante*, at 305–306 (quoting *Moskal* v. *United States*, 498 U. S. 103, 108 (1990) (citation omitted)). I doubt that *Moskal* accurately characterizes the law in this area, and I am certain that its treatment of "the venerable rule of lenity," *ante*, at 305, does not venerate the important values the old rule serves.

The *Moskal* formulation of the rule, in approving reliance on a statute's "motivating policies" (an obscure phrase), seems contrary to our statement in *Hughey* v. *United States*, 495 U. S. 411, 422 (1990), that "[e]ven [where] the statutory language . . . [is] ambiguous, longstanding principles of lenity . . . preclude our resolution of the ambiguity against [the criminal defendant] on the basis of general declarations of policy in the statute and legislative history." And insofar as *Moskal* requires consideration of legislative history *at all*, it compromises what we have described to be purposes of the lenity rule. "[A] fair warning," we have said, "should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line

should be clear." *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931). "[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota* v. *United States*, 471 U. S. 419, 427 (1985). It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, see *McBoyle*, *supra*, at 27, albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.

Moskal's mode of analysis also disserves the rule of lenity's other purpose: assuring that the society, through its representatives, has genuinely called for the punishment to be meted out. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U. S. 336, 348 (1971). See also *Liparota*, *supra*, at 427; *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820). The rule reflects, as the plurality acknowledges, "'"the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."'" *Ante*, at 305 (quoting *Bass*, *supra*, at 348, and H. Friendly, Benchmarks 209 (1967)). But legislative history can never provide assurance against that unacceptable result. After all, "[a] statute is a statute," *ante*, at 305, n. 5, and no matter how "authoritative" the history may be—even if it is that veritable Rosetta Stone of legislative archaeology, a crystal clear Committee Report—one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted *for sure* was the text of the enactment; the rest is *necessarily* speculation. Where it is doubtful whether the text includes the penalty, the penalty ought not be imposed. "[T]he moral condemnation of the community," *Bass*, *supra*, at 348, is no more re-

flected in the views of a majority of a single committee of congressmen (assuming, of course, they have genuinely considered what their staff has produced) than it is reflected in the views of a majority of an appellate court; we should feel no less concerned about "men languishing in prison" at the direction of the one than of the other.

We have in a number of cases other than *Moskal* done what the plurality has done here: inquired into legislative history and invoked it to support or at least permit the more lenient reading. But only once, to my knowledge, have we relied on legislative history to "clarify" a statute, explicitly found to be facially ambiguous, against the interest of a criminal defendant. In *Dixson* v. *United States*, 465 U. S. 482, 500–501, n. 19 (1984), the Court relied on legislative history to determine that defendants, officers of a corporation responsible for administering federal block grants, were "public officials" within the meaning of 18 U. S. C. § 201(a). The opinion does not trouble to discuss the "fair warning" or "condemnation of the community" implications of its decision, and both of the cases it cites in supposed support of its holding found the statute at hand *not* to be facially ambiguous. See *United States* v. *Moore*, 423 U. S. 122, 131 (1975) ("By its terms § 841 reaches 'any person'" and "does not exempt (as it could have) 'all registrants' or 'all persons registered under this Act'"); *United States* v. *Brown*, 333 U. S. 18, 22 (1948) ("The legislation reflects an unmistakable intention to provide punishment for escape or attempted escape to be superimposed upon the punishment meted out for previous offenses. This appears from the face of the statute itself"). I think *Dixson* weak (indeed, utterly unreasoned) foundation for a rule of construction that permits legislative history to satisfy the ancient requirement that criminal statutes speak "plainly and unmistakably," *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917); see also *Bass*, *supra*, at 348.

In sum, I would not embrace, as the plurality does, the *Moskal* formulation of this canon of construction, lest lower

courts take the dictum to heart. I would acknowledge the tension in our precedents, the absence of an examination of the consequences of the *Moskal* mode of analysis, and the consequent conclusion that *Moskal* may not be good law.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I agree with JUSTICE SCALIA that the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity. I write separately, however, to emphasize that the rule is not triggered merely because a statute appears textually ambiguous *on its face*. Just last Term, we reaffirmed that the rule operates only "'at the end of the process'" of construction, *Chapman* v. *United States*, 500 U. S. 453, 463 (1991) (quoting *Callanan* v. *United States*, 364 U. S. 587, 596 (1961)), if ambiguity remains "even after a court has "'seize[d] every thing from which aid can be derived,"'" *ibid.* (quoting *United States* v. *Bass*, 404 U. S. 336, 347 (1971), in turn quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805)). Thus, although we require Congress to enact "clear and definite" penal statutes, *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952), we also consult our own "well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 410 (1991), in determining whether the relevant text *is* clear and definite. See, *e. g.*, *id.*, at 404 (applying the rule in *Arnold* v. *United States*, 9 Cranch 104, 119–120 (1815), that statutes become effective immediately); *Albernaz* v. *United States*, 450 U. S. 333, 337–342 (1981) (applying the rule in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), to establish the permissibility of multiple punishments).

These cases, I think, demonstrate that we must presume familiarity not only with the United States Code, see *ante*, at 309, but also with the United States Reports, in which we have developed innumerable rules of construction powerful

enough to make clear an otherwise ambiguous penal statute. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984) ("clear congressional intent" may be discerned by application of "traditional tools of statutory construction"). Like Congress' statutes, the decisions of this Court are law, the knowledge of which we have always imputed to the citizenry. At issue here, though, is a rule that would also require knowledge of committee reports and floor statements, which are not law. I agree with JUSTICE SCALIA that there appears scant justification for extending the "necessary fiction" that citizens know the law, see *ante*, at 309, to such extralegal materials.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, dissenting.

By failing to interpret 18 U. S. C. § 5037(c)(1)(B) in light of the statutory scheme of which it is a part, the Court interprets a "technical amendment" to make sweeping changes to the process and focus of juvenile sentencing. Instead, the Court should honor Congress' clear intention to leave settled practice in juvenile sentencing undisturbed.

When Congress enacted the Sentencing Reform Act of 1984, it authorized the United States Sentencing Commission (Sentencing Commission or Commission) to overhaul the discretionary system of adult sentencing. As an important aspect of this overhaul, Guidelines sentencing formalizes sentencing procedures. The Commission explains:

> "*In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formal-*

ity is therefore unavoidable if the sentencing process is to be accurate and fair." United States Sentencing Commission, Guidelines Manual § 6A1.3, comment (Nov. 1991) (USSG).

Another significant change permits an appeal when the Guidelines are incorrectly applied or departed from, 18 U. S. C. § 3742; under prior law, a sentence within statutory limits was not generally subject to review, *United States* v. *Tucker*, 404 U. S. 443, 447 (1972). Thus, factual findings made at adult sentencing hearings can be challenged on appeal.

When Congress made these fundamental changes in sentencing, it repealed the Youth Corrections Act, Pub. L. 98–473, Title II, § 218(a)(8), 98 Stat. 2027 (1984), which gave special treatment to defendants under 22. Congress did not, however, repeal the Juvenile Delinquency Act, which applies to defendants under 18, and clearly indicated that the Commission was only to *study* the feasibility of sentencing guidelines for juveniles, see 28 U. S. C. §§ 995(a)(1)–(a)(9), a process which is still in progress. Brief for United States 11, n. 1. Thus, Congress did not intend the Guidelines to apply to juveniles. Section 5037(c)(1)(B) must be interpreted against this backdrop.

Before the Sentencing Reform Act, § 5037(c)(1)(B) limited juvenile sentences by the correlative adult statutory maximum. As part of the Sentencing Reform Act, Congress made clear that this past practice would remain the same by limiting juvenile sentences to: "the maximum term of imprisonment that would be authorized *by section 3581(b)* if the juvenile had been tried and convicted as an adult," 18 U. S. C. § 5037(c)(1)(B) (1982 ed., Supp. II) (emphasis added). The reference to § 3581(b), which classifies offenses and sets out maximum terms, clarified that the statutory maximum of the offense, not the Guideline maximum, would still limit the juvenile's sentence. Thus, consonant with its decision to leave juvenile sentencing in place, Congress did not change

§ 5037(c)(1)(B) to require sentencing judges in juvenile cases to calculate Guideline maximum sentences.

As the plurality acknowledges, *ante*, at 299–304, the cross-reference to § 3581(b) added by the Sentencing Reform Act created a new ambiguity as to whether the maximum sentence referred to was that authorized in the particular offense statute, or in the offense classification statute. To resolve the ambiguity, the cross-reference was deleted in 1986 as one of numerous technical amendments. The Court reads this technical amendment as changing § 3581's reference from the statutory maximum to the *Guideline* maximum, even though before the amendment the statute clearly did *not* refer to the Guideline maximum. While the original version of § 5037(c)(1)(B) was ambiguous in other respects, there was never any question that § 5037(c)(1)(B) referred to the adult statutory maximum. There is no indication that Congress intended to change pre-existing practice. Section 5037(c)(1)(B), read in this context, still unambiguously refers to the statutory maximum. And because § 5037(c)(1)(B) is unambiguous in this respect, the rule of lenity does not apply here. *Moskal* v. *United States*, 498 U. S. 103, 108 (1990) (Court may look to structure of statute to ascertain the sense of a provision before resorting to rule of lenity). The Court, however, construes § 5037(c)(1)(B) to change pre-existing practice only by reading it in a vacuum apart from the rest of the Sentencing Reform Act, thus violating the canon of construction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989).

The practical implications of the Court's reading demonstrate why its construction runs contrary to Congress' decision not to apply the Guidelines to juveniles. Requiring a district court to calculate a Guideline maximum for each juvenile imports formal factfinding procedures foreign to the discretionary sentencing system Congress intended to re-

tain. Juvenile proceedings, in contrast to adult proceedings, have traditionally aspired to be "intimate, informal [and] protective." *McKeiver* v. *Pennsylvania*, 403 U. S. 528, 545 (1971). One reason for the traditional informality of juvenile proceedings is that the focus of sentencing is on treatment, not punishment. The presumption is that juveniles are still teachable and not yet "hardened criminals." S. Rep. No. 1989, 75th Cong., 3d Sess., 1 (1938). See *McKeiver*, *supra;* 18 U. S. C. § 5039 ("Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community"). As a result, the sentencing considerations relevant to juveniles are far different from those relevant to adults.

The Court asserts, naively it seems to me, that it is not requiring "plenary application" of the Guidelines, *ante*, at 307, and makes the process of determining the Guideline maximum seem easy—a court need only look at the offense the juvenile was found guilty of violating and his criminal history, *ante*, at 296. In practice, however, calculating a Guideline maximum is much more complicated. Even in this relatively straightforward case, respondent was said to have stolen the car he was driving. Although apparently not placed in issue at the sentencing hearing, that conduct might, if proven and connected to the offense of which respondent was convicted, enhance the applicable Guideline maximum as "relevant conduct." See USSG § 1B1.3. Respondent's role in the offense might also warrant an adjustment of the Guideline maximum. §§ 3B1.1, 3B1.2. The District Court made a determination that respondent had not accepted responsibility, and that finding changed the calculation of the Guideline maximum. Tr. 3 (Jan. 25, 1991), § 3E1.1. The District Court also had to take into account factors not considered by the Guidelines in determining whether or not a departure was warranted, which would increase or decrease the "maximum" sentence by an undiscernible "reasonable" amount. Tr. 3–4, 18 U. S. C. § 3553(b). In short, the Guide-

line maximum is not static or readily ascertainable, but depends on particularized findings of fact and discretionary determinations made by the sentencing judge.

These determinations may even require adversarial evidentiary hearings. Yet such formal factual investigations are not provided for by the Juvenile Delinquency Act. There is no indication in the statute that the judge is required to support the sentence with particular findings. USSG §6A1.3 and Federal Rule of Criminal Procedure 32(a)(1), as amended after the Guidelines, do provide for an adversarial sentencing procedure for adults that accommodates Guideline factfinding. Rule 32 does not apply when it conflicts with provisions of the Juvenile Delinquency Act, however, see Fed. Rule Crim. Proc. 54(b)(5), and it seems to me a serious question whether adversarial factfinding is what Congress had in mind for juvenile sentencing. An even more serious question is whether Congress intended juveniles to be able to appeal the findings of fact that determine the Guideline maximum. Yet the Court's decision would seem to require provision for such appeals.

In addition, a Guideline maximum for an adult incorporates factors the Sentencing Commission has found irrelevant to juvenile sentencing, see, *e. g.*, USSG §4B1.1 (career offender status inapplicable to defendants under 18), and does not incorporate factors Congress has found relevant to juvenile sentencing, see, *e. g.*, USSG §§5H1.1, 5H1.6 (age and family ties irrelevant to Guideline sentencing). As a result, the Guideline maximum for an adult cannot serve as a useful point of comparison. In sum, the cumbersome process of determining a comparable Guideline maximum threatens to dominate the juvenile sentencing hearing at the expense of considerations more relevant to juveniles.

I cannot infer that Congress meant to overhaul and refocus the procedures of juvenile sentencing in such a fundamental way merely by deleting a cross-reference in a technical amendment, especially when Congress expressly left juve-

nile sentencing out of the scope of the Sentencing Reform Act and directed the Commission to examine how sentencing guidelines might be tailored to juveniles.

This case is admittedly unusual in that respondent was sentenced to a longer sentence than a similarly situated adult. Before the Guidelines were enacted, however, such anomalies were not unknown: A juvenile could receive a longer sentence than a similarly situated adult, as long as the sentence was within the statutory maximum. We should not try to address the disparity presented in this particular case by changing all juvenile sentencing in ways that Congress did not intend. Instead, we should wait for the Sentencing Commission and Congress to decide whether to fashion appropriate guidelines for juveniles. For this reason, I respectfully dissent.

Syllabus

NATIONWIDE MUTUAL INSURANCE CO. ET AL. *v.* DARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90–1802. Argued January 21, 1992—Decided March 24, 1992

Contracts between petitioners Nationwide Mutual Insurance Co. et al. and respondent Darden provided, among other things, that Darden would sell only Nationwide policies, that Nationwide would enroll him in a company retirement plan for agents, and that he would forfeit his entitlement to plan benefits if, within a year of his termination and 25 miles of his prior business location, he sold insurance for Nationwide's competitors. After his termination, Darden began selling insurance for those competitors. Nationwide charged that Darden's new business activities disqualified him from receiving his retirement plan benefits, for which he then sued under the Employee Retirement Income Security Act of 1974 (ERISA). The District Court granted summary judgment to Nationwide on the ground that Darden was not a proper ERISA plaintiff because, under common-law agency principles, he was an independent contractor rather than, as ERISA requires, an "employee," a term the Act defines as "any individual employed by an employer." Although agreeing that he "most probably would not qualify as an employee" under traditional agency law principles, the Court of Appeals reversed, finding the traditional definition inconsistent with ERISA's policy and purposes, and holding that an ERISA plaintiff can qualify as an "employee" simply by showing (1) that he had a reasonable expectation that he would receive benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of benefit plan forfeiture provisions. Applying this standard, the District Court found on remand that Darden had been Nationwide's "employee," and the Court of Appeals affirmed.

Held:

1. The term "employee" as used in ERISA incorporates traditional agency law criteria for identifying master-servant relationships. Where a statute containing that term does not helpfully define it, this Court presumes that Congress means an agency law definition unless it clearly indicates otherwise. See, *e. g., Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 739–740. ERISA's nominal definition of "employee" is completely circular and explains nothing, and the Act contains no other provision that either gives specific guidance on the term's

meaning or suggests that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Since the multifactor common-law test here adopted, see, *e. g.*, *id.*, at 751–752, contains no shorthand formula for determining who is an "employee," all of the incidents of the employment relationship must be assessed and weighed with no one factor being decisive. *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111; *United States* v. *Silk*, 331 U. S. 704; *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, distinguished. Pp. 322–327.

2. The case is remanded for a determination whether Darden qualifies as an "employee" under traditional agency law principles. P. 328.

922 F. 2d 203, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

George Robinson Ragsdale argued the cause for petitioners. With him on the briefs were *Gordon E. McCutchan, Robert M. Parsons, Craig G. Dalton, Jr., Francis M. Gregory, Jr.*, and *Margaret M. Richardson.*

Christopher J. Wright argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Deputy Solicitor General Mahoney, Allen H. Feldman*, and *Elizabeth Hopkins.*

Marion G. Follin III argued the cause and filed a brief for respondent.*

JUSTICE SOUTER delivered the opinion of the Court.

In this case we construe the term "employee" as it appears in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 834, 29 U. S. C. § 1002(6), and read it to incorporate traditional agency law criteria for identifying master-servant relationships.

I

From 1962 through 1980, respondent Robert Darden operated an insurance agency according to the terms of several

**Edward N. Delaney* and *Russell A. Hollrah* filed a brief for the National Association of Independent Insurers as *amicus curiae* urging reversal.

contracts he signed with petitioners Nationwide Mutual Insurance Co. et al. Darden promised to sell only Nationwide insurance policies, and, in exchange, Nationwide agreed to pay him commissions on his sales and enroll him in a company retirement scheme called the "Agent's Security Compensation Plan" (Plan). The Plan consisted of two different programs: the "Deferred Compensation Incentive Credit Plan," under which Nationwide annually credited an agent's retirement account with a sum based on his business performance, and the "Extended Earnings Plan," under which Nationwide paid an agent, upon retirement or termination, a sum equal to the total of his policy renewal fees for the previous 12 months.

Such were the contractual terms, however, that Darden would forfeit his entitlement to the Plan's benefits if, within a year of his termination and 25 miles of his prior business location, he sold insurance for Nationwide's competitors. The contracts also disqualified him from receiving those benefits if, after he stopped representing Nationwide, he ever induced a Nationwide policyholder to cancel one of its policies.

In November 1980, Nationwide exercised its contractual right to end its relationship with Darden. A month later, Darden became an independent insurance agent and, doing business from his old office, sold insurance policies for several of Nationwide's competitors. The company reacted with the charge that his new business activities disqualified him from receiving the Plan benefits to which he would have been entitled otherwise. Darden then sued for the benefits, which he claimed were nonforfeitable because already vested under the terms of ERISA. 29 U. S. C. § 1053(a).

Darden brought his action under 29 U. S. C. § 1132(a), which enables a benefit plan "participant" to enforce the substantive provisions of ERISA. The Act elsewhere defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit

of any type from an employee benefit plan . . . ." § 1002(7). Thus, Darden's ERISA claim can succeed only if he was Nationwide's "employee," a term the Act defines as "any individual employed by an employer." § 1002(6).

It was on this point that the District Court granted summary judgment to Nationwide. After applying common-law agency principles and, to an extent unspecified, our decision in *United States* v. *Silk*, 331 U. S. 704 (1947), the court found that "'the total factual context' of Mr. Darden's relationship with Nationwide shows that he was an independent contractor and not an employee." App. to Pet. for Cert. 47a, 50a, quoting *NLRB* v. *United Ins. Co. of America*, 390 U. S. 254 (1968).

The United States Court of Appeals for the Fourth Circuit vacated. *Darden* v. *Nationwide Mutual Ins. Co.*, 796 F. 2d 701 (1986). After observing that "Darden most probably would not qualify as an employee" under traditional principles of agency law, *id.*, at 705, it found the traditional definition inconsistent with the "'declared policy and purposes'" of ERISA, *id.*, at 706, quoting *Silk*, *supra*, at 713, and *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131–132 (1944), and specifically with the congressional statement of purpose found in § 2 of the Act, 29 U. S. C. § 1001.[1] It therefore held that an ERISA plaintiff can qualify as an "employee" simply by showing "(1) that he had a reasonable expectation that he would receive [pension] benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of [benefit plan] forfeiture provisions."

---

[1] The Court of Appeals cited Congress's declaration that "many employees with long years of employment are losing anticipated retirement benefits," that employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that ERISA was necessary to "assur[e] the equitable character of such plans and their financial soundness." 796 F. 2d, at 706, quoting 29 U. S. C. § 1001. None of these passages deals specifically with the scope of ERISA's class of beneficiaries.

922 F. 2d 203, 205 (CA4 1991) (summarizing 796 F. 2d 701 (CA4 1986)). The court remanded the case to the District Court, which then found that Darden had been Nationwide's "employee" under the standard set by the Court of Appeals. 717 F. Supp. 388 (EDNC 1989). The Court of Appeals affirmed. 922 F. 2d 203 (1991).[2]

In due course, Nationwide filed a petition for certiorari, which we granted on October 15, 1991. 502 U. S. 905. We now reverse.

II

We have often been asked to construe the meaning of "employee" where the statute containing the term does not helpfully define it. Most recently we confronted this problem in *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730 (1989), a case in which a sculptor and a nonprofit group each claimed copyright ownership in a statue the group had commissioned from the artist. The dispute ultimately turned on whether, by the terms of § 101 of the Copyright Act of 1976, 17 U. S. C. § 101, the statue had been "prepared by an employee within the scope of his or her employment." Because the Copyright Act nowhere defined the term "employee," we unanimously applied the "well established" principle that

> "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conven-

---

[2] The Court of Appeals also held that the Deferred Compensation Plan was a pension plan subject to regulation under ERISA, but that the Extended Earnings Plan was not. 922 F. 2d, at 208. We denied Darden's cross-petition for certiorari, which sought review of that conclusion. 502 U. S. 906 (1991).

> tional master-servant relationship as understood by common-law agency doctrine. See, *e. g., Kelley* v. *Southern Pacific Co.*, 419 U. S. 318, 322–323 (1974); *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, 228 (1959) *(per curiam); Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94 (1915)." 490 U. S., at 739–740 (internal quotation marks omitted).

While we supported this reading of the Copyright Act with other observations, the general rule stood as independent authority for the decision.

So too should it stand here. ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U. S. C. § 1002(6), is completely circular and explains nothing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an "employee" under ERISA,[3] a test we most recently summarized in *Reid:*

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired

[3] As in *Reid*, we construe the term to incorporate "the general common law of agency, rather than . . . the law of any particular State." *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 740 (1989).

> party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." 490 U. S., at 751–752 (footnotes omitted).

Cf. Restatement (Second) of Agency § 220(2) (1958) (listing nonexhaustive criteria for identifying master-servant relationship); Rev. Rul. 87–41, 1987–1 Cum. Bull. 296, 298–299 (setting forth 20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts). Since the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America*, 390 U. S., at 258.

In taking its different tack, the Court of Appeals cited *NLRB* v. *Hearst Publications, Inc.*, 322 U. S., at 120–129, and *United States* v. *Silk*, 331 U. S., at 713, for the proposition that "the content of the term 'employee' in the context of a particular federal statute is 'to be construed "in the light of the mischief to be corrected and the end to be attained."'" *Darden*, 796 F. 2d, at 706, quoting *Silk*, *supra*, at 713, in turn quoting *Hearst*, *supra*, at 124. But *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined,[4] to imply something broader than the common-law definition; after each opinion, Congress

---

[4]The National Labor Relations Act simply defined "employee" to mean (in relevant part) "any employee." 49 Stat. 450 (1935). The Social Security Act defined the term to "include," among other, unspecified occupations, "an officer of a corporation." 49 Stat. 647.

amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. See *United Ins. Co.*, *supra*, at 256 ("Congressional reaction to *[Hearst]* was adverse and Congress passed an amendment . . . [t]he obvious purpose of [which] was to have the . . . courts apply general agency principles in distinguishing between employees and independent contractors under the Act"); Social Security Act of 1948, ch. 468, § 1(a), 62 Stat. 438 (1948) (amending statute to provide that term "employee" "does not include . . . any individual who, under the *usual common-law rules* applicable in determining the employer-employee relationship, has the status of an independent contractor") (emphasis added); see also *United States* v. *W. M. Webb, Inc.*, 397 U. S. 179, 183–188 (1970) (discussing congressional reaction to *Silk*).

To be sure, Congress did not, strictly speaking, "overrule" our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term "'in the light of the mischief to be corrected and the end to be attained.'" *Silk*, *supra*, at 713, quoting *Hearst*, *supra*, at 124.

At oral argument, Darden tried to subordinate *Reid* to *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722 (1947), which adopted a broad reading of "employee" under the Fair Labor Standards Act (FLSA). And *amicus* United States, while rejecting Darden's position, also relied on *Rutherford Food* for the proposition that, when enacting ERISA, Congress must have intended a modified common-law definition of "employee" that would advance, in a way not defined, the Act's "remedial purposes." Brief for United States as *Ami-*

cus Curiae 15–21.[5] But *Rutherfood Food* supports neither position. The definition of "employee" in the FLSA evidently derives from the child labor statutes, see *Rutherford Food, supra,* at 728, and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an "employee" to include "any individual employed by an employer," it defines the verb "employ" expansively to mean "suffer or permit to work." 52 Stat. 1060, § 3, codified at 29 U. S. C. §§ 203(e), (g). This latter definition, whose striking breadth we have previously noted, *Rutherford Food, supra,* at 728, stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA's concept of "employee."

Quite apart from its inconsistency with our precedents, the Fourth Circuit's analysis reveals an approach infected with circularity and unable to furnish predictable results. Applying the first element of its test, which ostensibly enquires into an employee's "expectations," the Court of Appeals concluded that Nationwide had "created a reasonable expectation on the 'employees' part that benefits would be paid to them in the future," *Darden,* 796 F. 2d, at 706, by establishing "a comprehensive retirement benefits program for its insurance agents," *id.,* at 707. The court thought it was simply irrelevant that the forfeiture clause in Darden's contract "limited" his expectation of receiving pension benefits, since "it is precisely that sort of employer-imposed condition on the *employee's* anticipations that Congress intended to out-

---

[5] While both Darden and the United States cite a Department of Labor "Opinion Letter" as support for their separate positions, see Brief for Respondent 34–35, Brief for United States as *Amicus Curiae* 16–18, neither suggests that we owe that letter's legal conclusions any deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 844 (1984).

law with the enactment of ERISA." *Id.*, at 707, n. 7 (emphasis added). Thus, the Fourth Circuit's test would turn not on a claimant's actual "expectations," which the court effectively deemed inconsequential, *ibid.*, but on his statutory entitlement to relief, which itself depends on his very status as an "employee." This begs the question.

This circularity infects the test's second prong as well, which considers the extent to which a claimant has relied on his "expectation" of benefits by "remaining for 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for [his] retirement." *Id.*, at 706. While this enquiry is ostensibly factual, we have seen already that one of its objects may not be: to the extent that actual "expectations" are (as in Darden's case) unnecessary to relief, the nature of a claimant's required "reliance" is left unclear. Moreover, any enquiry into "reliance," whatever it might entail, could apparently lead to different results for claimants holding identical jobs and enrolled in identical plans. Because, for example, Darden failed to make much independent provision for his retirement, he satisfied the "reliance" prong of the Fourth Circuit's test, see 922 F. 2d, at 206, whereas a more provident colleague who signed exactly the same contracts, but saved for a rainy day, might not.

Any such approach would severely compromise the capacity of companies like Nationwide to figure out who their "employees" are and what, by extension, their pension-fund obligations will be. To be sure, the traditional agency law criteria offer no paradigm of determinacy. But their application generally turns on factual variables within an employer's knowledge, thus permitting categorical judgments about the "employee" status of claimants with similar job descriptions. Agency law principles comport, moreover, with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor.

III

While the Court of Appeals noted that "Darden most probably would not qualify as an employee" under traditional agency law principles, *Darden, supra,* at 705, it did not actually decide that issue. We therefore reverse the judgment and remand the case to that court for proceedings consistent with this opinion.

So ordered.

Syllabus

UNITED STATES *v.* WILSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90–1745. Argued January 15, 1992—Decided March 24, 1992

In sentencing respondent Wilson to prison for violating the Hobbs Act, the District Court denied his request for credit under 18 U. S. C. § 3585(b) for the time he had spent in presentence detention by Tennessee authorities. After a state trial court credited such time against his prison term for state-law convictions, the Court of Appeals reversed the District Court's ruling, holding that he had a right to federal credit and that the District Court should have awarded it to him.

Held: It is the Attorney General who computes the amount of the § 3585(b) credit after the defendant has begun to serve his sentence. Pp. 331–337.

(a) Effective in 1987, § 3585(b)—which specifies, *inter alia*, that "*[a] defendant shall be given credit* toward [his] term of imprisonment for any time he has spent in official detention prior to the date the sentence commences," if such time "has not been credited against another sentence" (emphasis added)—replaced a statute which had provided, among other things, that *"[t]he Attorney General shall give any such person credit"* (emphasis added). Under the predecessor statute, the Attorney General, through the Bureau of Prisons (BOP), computed the amount of credit after taking custody of the sentenced federal offender. Pp. 331–333.

(b) Section 3585(b) does not authorize a district court to compute the credit at sentencing. By stating crucial verbs in the past and present perfect tenses, the section indicates that the computation must occur after the defendant begins his sentence. A sentencing court, therefore, cannot apply the section. Indeed, the District Court here could not have made the necessary computation at sentencing, since the credit is based on how much time a defendant "has spent" (not "will have spent") prior to beginning his sentence. The court did not then know when the state-court proceedings would end or when the federal authorities would take Wilson into custody, and only could have speculated about the amount of time that he would spend in detention. Moreover, it is immaterial that such detention "ha[d] not been credited" against a state sentence at the time of Wilson's federal sentencing, since basing the award of credit on the relative timing of sentencing proceedings would result in arbitrary awards. Pp. 333–334.

(c) In light of the sentencing court's inability to compute the credit, the Attorney General must continue to make the calculation as he did in the past, even though § 3585(b) no longer mentions him. The offender has a right to certain jail-time credit under the section, and BOP must know how much of a sentence remains in order to fulfill its statutory duty of administering the sentence. Congress' conversion of the former statute's active language into the passive voice in § 3585(b) is a slim ground for presuming an intention to change well-established procedures for determining the credit. Pp. 334–336.

(d) The general presumption that Congress contemplates a change whenever it amends a statute is overcome in this case by the foregoing analysis. Because the statute was entirely rewritten, and because any other interpretation would require this Court to stretch § 3585(b)'s language, it is likely that the former reference to the Attorney General was simply lost in the shuffle. This interpretation does not render the 1987 revision meaningless, since Congress altered the predecessor statute in at least three other ways. Pp. 336–337.

916 F. 2d 1115, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 337.

Amy L. Wax argued the cause for the United States. With her on the briefs were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Joel M. Gershowitz*.

Henry A. Martin, by appointment of the Court, 502 U. S. 936, argued the cause for respondent. With him on the brief were *Deborah S. Swettenam* and *Alan Morrison*.

JUSTICE THOMAS delivered the opinion of the Court.

A defendant convicted of a federal crime has a right under 18 U. S. C. § 3585(b) to receive credit for certain time spent in official detention before his sentence begins. In this case, we must decide whether the District Court calculates the credit at the time of sentencing or whether the Attorney General computes it after the defendant has begun to serve his sentence.

I

In the summer and early fall of 1988, respondent Richard Wilson committed several crimes in Putnam County, Tennessee. The precise details of these crimes do not concern us here. It suffices to state that Tennessee authorities arrested Wilson on October 5, 1988, and held him in jail pending the outcome of federal and state prosecutions. After certain preliminary proceedings, Wilson eventually pleaded guilty to various federal and state criminal charges.

On November 29, 1989, the United States District Court for the Middle District of Tennessee sentenced Wilson to 96 months' imprisonment for violation of the Hobbs Act, 18 U. S. C. § 1951. The District Court denied Wilson's request for credit for time served during his presentence state custody. On December 12, 1989, a Tennessee trial court sentenced Wilson to several years' imprisonment for robbery and two other felonies. In contrast to the District Court, the state court granted Wilson 429 days of credit toward his state sentence. Later that day, Tennessee authorities transferred Wilson to federal custody, and he began serving his federal sentence.

Wilson appealed the District Court's refusal to give him credit for the time that he had spent in state custody. Reversing the District Court, the United States Court of Appeals for the Sixth Circuit held that Wilson had a right to credit and that the District Court should have awarded it to him. 916 F. 2d 1115 (1990). We granted certiorari, 502 U. S. 807 (1991), and now reverse.

II

The Attorney General, through the Bureau of Prisons (BOP), has responsibility for imprisoning federal offenders. See 18 U. S. C. § 3621(a). From 1966 until 1987, a provision codified at 18 U. S. C. § 3568 (1982 ed.) required the Attorney General to award federal prisoners credit for certain time

spent in jail prior to the commencement of their sentences. This provision, in part, stated:

> "*The Attorney General shall give any such person credit* toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." Pub. L. 89–465, § 4, 80 Stat. 217 (emphasis added).

The Attorney General implemented this provision by computing the amount of credit after taking custody of the sentenced federal offender. Although the federal courts could review the Attorney General's determination, the sentencing court did not participate in computation of the credit. See, *e. g., United States* v. *Morgan*, 425 F. 2d 1388, 1389–1390 (CA5 1970).

In the Sentencing Reform Act of 1984, 18 U. S. C. § 3551 *et seq.*, which became effective in 1987, Congress rewrote § 3568 and recodified it at § 3585(b). Unlike its predecessor, § 3585(b) does not mention the Attorney General. Written in the passive voice, it states:

> "*A defendant shall be given credit* toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> "(1) as a result of the offense for which the sentence was imposed; or
>
> "(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> "that has not been credited against another sentence." 18 U. S. C. § 3585(b) (emphasis added).

In describing the defendant's right to receive jail-time credit in this manner, the provision has created doubt about whether district courts now may award credit when imposing a sentence. The question has significance in this case

because the final clause of § 3585(b) allows a defendant to receive credit only for detention time "that has not been credited against another sentence." When the District Court imposed Wilson's 96-month sentence on November 29, 1989, Wilson had not yet received credit for his detention time from the Tennessee courts. However, by the time the Attorney General imprisoned Wilson on December 12, 1989, the Tennessee trial court had awarded Wilson 429 days of credit. As a result, Wilson could receive a larger credit if the statute permitted crediting at sentencing, and thus before the detention time had been credited against another sentence.

The United States argues that it is the Attorney General who computes the amount of the credit after the defendant begins his sentence and that the Court of Appeals erred in ordering the District Court to award credit to Wilson. Wilson counters that § 3585(b) authorizes the District Court to compute the amount of the credit at sentencing. We agree with the United States.

A

We do not accept Wilson's argument that § 3585(b) authorizes a district court to award credit at sentencing. Section 3585(b) indicates that a defendant may receive credit against a sentence that "*was imposed.*" It also specifies that the amount of the credit depends on the time that the defendant "*has spent*" in official detention "prior to the date the sentence commences." Congress' use of a verb tense is significant in construing statutes. See, *e. g.*, *Otte* v. *United States*, 419 U. S. 43, 49–50 (1974); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 63–64, n. 4 (1987). By using these verbs in the past and present perfect tenses, Congress has indicated that computation of the credit must occur after the defendant begins his sentence. A district court, therefore, cannot apply § 3585(b) at sentencing.

Federal defendants do not always begin to serve their sentences immediately. In this case, the District Court sen-

tenced Wilson on November 29, 1989, but Wilson did not begin his sentence until December 12, 1989. At sentencing, the District Court only could have speculated about the amount of time that Wilson would spend in detention prior to the commencement of his sentence; the court did not know when the state-court proceedings would end or when the federal authorities would take Wilson into custody. Because § 3585(b) bases the credit on how much time a defendant "has spent" (not "will have spent") prior to beginning his sentence, the District Court could not compute the amount of the credit at sentencing.

The final phrase of § 3585(b) confirms this interpretation. As noted above, it authorizes credit only for time that "has not been credited against another sentence." Wilson argues that this phrase does not prevent him from receiving credit because his official detention "ha[d] not been credited" against the state sentence when the District Court imposed the federal sentence. Under this logic, however, if the District Court had sentenced Wilson a few weeks later than it did, he would not have received credit under § 3585(b). This interpretation of the statute would make the award of credit arbitrary, a result not to be presumed lightly. See *United States* v. *Turkette*, 452 U. S. 576, 580 (1981) (absurd results are to be avoided). We can imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing. For these reasons, we conclude that § 3585(b) does not authorize a district court to compute the credit at sentencing.

B

We agree with the United States that the Attorney General must continue to compute the credit under § 3585(b) as he did under the former § 3568. When Congress writes a statute in the passive voice, it often fails to indicate who must take a required action. This silence can make the

meaning of a statute somewhat difficult to ascertain. See, *e. g., E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 128 (1977); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 102–103 (1979). Yet, even though § 3585(b) no longer mentions the Attorney General, we do not see how he can avoid determining the amount of a defendant's jail-time credit.

After a district court sentences a federal offender, the Attorney General, through BOP, has the responsibility for administering the sentence. See 18 U. S. C. § 3621(a) ("A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed"). To fulfill this duty, BOP must know how much of the sentence the offender has left to serve. Because the offender has a right to certain jail-time credit under § 3585(b), and because the district court cannot determine the amount of the credit at sentencing, the Attorney General has no choice but to make the determination as an administrative matter when imprisoning the defendant.

Crediting jail time against federal sentences long has operated in this manner. After Congress enacted § 3568 in 1966, BOP developed detailed procedures and guidelines for determining the credit available to prisoners. See Federal Prison System Program Statement No. 5880.24 (Sept. 5, 1979) and Federal Bureau of Prisons Operations Memorandum No. EMS DM 154–89 (Oct. 23, 1989), Apps. B and C to Brief for United States (stating BOP's procedures for computing jail-time credit determinations); see also *United States* v. *Lucas*, 898 F. 2d 1554 (CA11 1990). Federal regulations have afforded prisoners administrative review of the computation of their credits, see 28 CFR §§ 542.10–542.16 (1990); *Lucas*, *supra*, at 1556, and prisoners have been able to seek judicial review of these computations after exhausting their administrative remedies, see *United States* v. *Bayless*, 940 F. 2d 300, 304–305 (CA8 1991); *United States* v. *Flanagan*, 868 F. 2d

1544, 1546 (CA11 1989); *United States* v. *Martinez*, 837 F. 2d 861, 865–866 (CA9 1988). Congress' conversion of an active sentence in § 3568 into a passive sentence in § 3585(b) strikes us as a rather slim ground for presuming an intention to change these well-established procedures. "It is not lightly to be assumed that Congress intended to depart from a long established policy." *Robertson* v. *Railroad Labor Bd.*, 268 U. S. 619, 627 (1925).

C

Wilson argues that our conclusion conflicts with the familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning. See *Russello* v. *United States*, 464 U. S. 16, 23–24 (1983). He asserts that, by removing the explicit reference to the Attorney General when it enacted § 3585(b), Congress expressed a desire to remove the Attorney General from the process of computing sentences. Otherwise, Wilson contends, Congress would have had no reason to modify the provision as it did. We have no difficulty with the general presumption that Congress contemplates a change whenever it amends a statute. In this case, however, we find that presumption overcome by our conclusions that the District Court cannot perform the necessary calculation at the time of sentencing and that the Attorney General, in implementing the defendant's sentence, cannot avoid computing the credit.

We candidly acknowledge that we do not know what happened to the reference to the Attorney General during the revision. We do know that Congress entirely rewrote § 3568 when it changed it to its present form in § 3585(b). It rearranged its clauses, rephrased its central idea in the passive voice, and more than doubled its length. In view of these changes, and because any other interpretation would require us to stretch the meaning of the words that § 3585(b) now includes, we think it likely that the former reference to the Attorney General was simply lost in the shuffle.

Our interpretation of § 3585(b), however, does not render the 1987 revision meaningless. Congress altered § 3568 in at least three ways when it enacted § 3585(b). First, Congress replaced the term "custody" with the term "official detention." Second, Congress made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit. Under the old law, a defendant could receive credit only for time spent in custody in connection with "the offense . . . for which sentence was imposed." Under the new law, a defendant may receive credit both for this time and for time spent in official detention in connection with "any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed." In light of these revisions, and for the foregoing reasons, we conclude that the Attorney General may continue to compute the amount of the credit. The judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

Today's rigid interpretation of a remedial statute is not supported by the text, legislative history, or underlying policies of the statute. In *Crandon* v. *United States*, 494 U. S. 152, 158 (1990), this Court said that "[i]n determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." The Court has failed to do this today. The statute at issue, 18 U. S. C. § 3585(b), gives the convicted defendant a right to have his term of imprisonment shortened by the amount of time he has already spent in either federal or state custody as a result of

his offense, provided that the time has not already been credited against another sentence.[1]

The defendant's right to the full credit authorized by the statute is obviously an important right. Both the Attorney General and the sentencing judge have a duty to respect and protect that right. Moreover, it is clear that in the event there is a dispute between the parties over the right to a credit, the dispute must be resolved by the court. No one contends that the Attorney General has unreviewable discretion to determine the appropriate credit in any case.[2]

In most cases, the calculation of the credit is a routine, ministerial task that will not give rise to any dispute.[3] Occasionally, however, as this case demonstrates, there may be a legitimate difference of opinion either about the meaning of the statute or about the relevant facts.[4] Such a dispute

---

[1] Title 18 U. S. C. § 3585(b) provides:

"(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

"(1) as a result of the offense for which the sentence was imposed; or

"(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

"that has not been credited against another sentence."

[2] Prior to 1987, when the statute assigned the initial responsibility for determining the length of the credit to the Attorney General, it was settled that his determination was subject to judicial review after the prisoner exhausted his administrative remedies. See *Chua Han Mow* v. *United States*, 730 F. 2d 1308, 1313 (CA9 1984), cert. denied, 470 U. S. 1031 (1985).

[3] As respondent acknowledged, "the arithmetical task of figuring out the exact date an offender will finish serving his sentence" "is essentially an administrative ministerial function." Tr. of Oral Arg. 4; see also *id.*, at 10, 21, 52.

[4] Typically the dispute centers on whether the questioned time was "official detention" or whether the time has already been "credited" to another sentence. See, *e. g.*, *United States* v. *Beston*, 936 F. 2d 361 (CA8 1991) *(per curiam)*; *United States* v. *Chalker*, 915 F. 2d 1254 (CA9 1990); *United States* v. *Woods*, 888 F. 2d 653 (CA10 1989), cert. denied, 494 U. S. 1006 (1990).

must, of course, be resolved by the judge. The only question that remains, then, is *when* the judge shall resolve the issue—at the time of sentencing, when the defendant is represented by counsel, or at some later date, after the defendant has begun to serve his sentence.

The credit at issue in this case was a period of almost 14 months that respondent had spent in state custody before he entered into a plea agreement with the federal prosecutor.[5] Prior to the amendment of § 3585(b),[6] which became effective in 1987, the statute—at least as construed by the Sixth Circuit where this case arose—did not authorize a credit for time spent in state custody. See *United States* v. *Blankenship*, 733 F. 2d 433, 434 (1984).[7] Consistent with that pre-amendment practice, the District Court denied respondent's request for credit for the 14 months that he had spent in state custody.[8] There are two points that emerge from that

[5] In the District Court, the Government did not take any position with respect to respondent's request for jail credit, stating that "as to defense's petition that the time spent incarcerated on state charges for the crimes which occurred prior to the federal conspiracy, that's up to the court and the government takes no position as to that." Tr. 86. In the Court of Appeals, however, the Government contended that respondent was not entitled to the credit. See Brief for Appellee in No. 89–6583 (CA6), pp. 14–15.

[6] Before § 3585 became effective, 18 U. S. C. § 3568 (1982 ed.) governed credit for presentence time spent in official detention.

[7] See also *United States* v. *Garcia-Gutierrez*, 835 F. 2d 585, 586 (CA5 1988) (construing former § 3568).

[8] "IT IS THE JUDGMENT OF THIS COURT THAT defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

"Ninety six months (96), which includes an upward departure of thirty-three months. Defendant is unable to pay a fine, or the cost of his incarceration or supervised release. Defendant will not be given any credit for the time spent in state custody." Record, Doc. No. 56.

The Government defended this ruling in its brief to the Court of Appeals, arguing:

"Although there is some authority that a defendant is entitled to credit for time served in state custody once a federal detainer has been lodged, the state confinement must be the product of action by federal law enforce-

ruling: First, the District Court erroneously construed the amended statute, and second, the legal question that the District Court decided was ripe for decision at the time of sentencing.

In its opinion today, the Court emphasizes the fact that the state court later awarded respondent credit for his 14 months in pretrial detention, arguing that he therefore would not have been entitled to a federal credit if the federal determination had been made after the state sentence was imposed. See *ante*, at 333, 334. This argument is misleading for three reasons. First, if the Federal District Court had granted respondent's request, it seems unlikely that the state court would also have allowed the credit. Second, although the Court assumes that the risk of a double credit could be avoided by postponing the credit determination until after the convicted defendant begins to serve his federal sentence, that assumption is erroneous because state proceedings frequently do not terminate until after a defendant begins to serve his federal sentence or, indeed, in some cases, until after the defendant has been released from federal custody. Third, when a correct federal sentence, including a correct credit for pretrial custody, has been imposed, the subsequent action of a state court concerning the amount of punishment for any state offenses the defendant may have committed is purely a matter of state concern.

In this case, for example, if the Federal Sentencing Guidelines had prescribed a sentence of less than 14 months, and if the District Court, or indeed the Attorney General, had awarded respondent the proper credit, and therefore released him from custody, it would be bizarre to conclude that

---

ment officials. *United States* v. *Garcia-Gutierrez*, 835 F. 2d 585, 586 (5th Cir. 1988); *United States* v. *Harris*, 876 F. 2d 1502, 1506 (11th Cir. 1989), *cert. denied*, [493 U. S. 1005] (1989). The federal detainer must be the exclusive reason a prisoner in state custody has not been released on bail. *United States* v. *Blankenship*, 733 F. 2d 433, 434 (6th Cir. 1984)." Brief for Appellee in No. 89–6583, pp. 14–15.

the Federal Government should rearrest him if a Tennessee court subsequently decided to give him the same credit because he would already have served almost 14 months in custody, thus fulfilling his federal sentence. The *possibility* that a state court will allow the same credit that a federal court allows exists whenever a state sentence is imposed after the federal credit determination is made, whether it is made by the trial judge or by the Attorney General and whether it is made at the sentencing hearing or at the commencement of the federal sentence. The *likelihood* that the state court will allow a second credit after a federal credit has been allowed seems remote no matter when or by whom the federal determination is made. More importantly, the existence of a hypothetical risk of double credits in rare cases involving overlapping state and federal jurisdiction is not a sufficient reason for refusing to give effect to the plain language of the statute in cases in which no such problem is presented.

I

The Court's entire analysis rests on an incorrect premise. The Court assumes that the statute mandates one of two starkly different procedures: *Either* the credit determination must *always* be made by the Attorney General after the defendant has begun to serve his sentence, *or* it must *always* be made by the sentencing judge at the time of sentencing. Neither of these procedures is compelled by the statutory text. An ordinary reading of the statute's plain language ("[a] defendant *shall be given* credit toward the service of a term of imprisonment . . .") suggests that the judge has ample authority to delegate the task of calculating the credit to a probation officer or to the prosecutor, subject, of course, to judicial review, or to make it himself in the first instance. Surely there is nothing in the statutory text that purports to deprive the judge of discretion to follow whichever procedure seems best suited to the particular facts of a given case. The text, which uses the passive voice, does not specify who

will make the decision about jail credit. Certainly we should give effect to Congress' choice of words, and understand that the text, as written, does not identify a particular decisionmaker, and therefore, the appropriate decisionmaker may be *either* the judge or the Attorney General depending on the circumstances.[9]

The statute does indicate that the decision should be made after "the sentence was imposed" and that the credit shall include time spent in official detention "prior to the date the sentence commences" even if some of that time is after the sentencing hearing. If, as is true in most cases, the convicted defendant begins to serve his sentence immediately after it is imposed, it is perfectly consistent with the text in such cases to have the judge determine the credit at the conclusion of the sentencing hearing. Even if the commencement of the sentence is postponed until a later date, an order specifying the amount of the credit to which the defendant was then entitled, and directing that an additional credit be given if appropriate, would also conform to the statutory text. The statute does not prohibit the judge from resolving the issue at any time after the sentence has been imposed.[10] In short, the text does not mandate any particular procedure that must be followed in every case.

---

[9] Those Courts of Appeals that have recognized the shared role of the sentencing judge and the Attorney General in the decision to award jail credit include the Ninth Circuit and the Eighth Circuit. See, *e. g.*, *United States* v. *Chalker*, 915 F. 2d, at 1258; *United States* v. *Beston*, 936 F. 2d, at 363.

[10] "Instead, we conclude that by failing to specify to whom such power was vested, Congress intended the Attorney General and the district courts to have concurrent authority to grant credit for time served. As a practical matter, our holding will give to the district court, in its discretion, the initial opportunity to grant credit for time previously served. We believe this result to be fully compatible with Congress' intent in passing the Comprehensive Crime Control Act of 1984. The Senate Report, in discussing the sentencing provisions of the Act, specifically decried the lack of certainty and finality under the pre-Guidelines sentencing system to the effect that 'prisoners often do not really know how long they will

Although Congress' use of the passive voice clearly leaves open the question of who the decisionmaker is with respect to jail credit, the placement of § 3585 in Subchapter D–Imprisonment, in which "the court" is called upon to determine the sentence, § 3581, impose the sentence, § 3582, include a term of supervised release, § 3583, and determine whether the term is to run concurrently or consecutively in the case of multiple sentences, § 3584, clearly points to the judge as the person who is to calculate credit, § 3585, in the first instance. Congress could have made this perfectly clear by repeating the phrase "the court" in § 3585, but that was made almost unnecessary by placing § 3585 in a subchapter in which the court clearly had responsibility for every action that needed to be taken, but could also delegate actions to the appropriate authorities.

II

The Court's textual argument amounts to nothing more than an assertion that because *sometimes* all issues relating to the credit determination will not be ripe for decision at the time of sentencing, the trial court *never* has authority to make the credit determination even in cases that are ripe for decision.[11] Because this reasoning is so plainly flawed, the

spend in prison until the very day they are released.' *Crime Control Act*, S. Rep. No. 225, 98th Cong., 2d Sess. at 49, *reprinted in* 1984 U. S. Code Cong. & Admin. News at 3232. Allowing the district court, in its discretion, to compute credit time when the sentence is imposed furthers this congressional purpose by informing one convicted of a crime at the outset of their sentence precisely how long they will spend in prison." *United States* v. *Chalker*, 915 F. 2d, at 1258 (footnotes omitted).

[11] Certainly there are some credit issues that can arise that are ripe for decision at the time of the sentencing hearing. What constitutes "official detention" is one such issue. It is also an issue on which the Courts of Appeals are currently divided. For example, in *Moreland* v. *United States*, 932 F. 2d 690, 692 (1991), the Eighth Circuit agreed with Moreland that he should receive credit for the time he spent at a community treatment center; however, in *United States* v. *Insley*, 927 F. 2d 185, 186 (1991), the Fourth Circuit held that Insley's conditions of release did not consti-

Court's holding must rest on its understanding of the legislative history. The history on which the Court relies includes no relevant comments in the Committee Reports or the debates. It consists only of the fact that prior to 1987 the statute directed the Attorney General to make the credit determination. See *ante*, at 331–332. It seems to me, however, that that smidgen of history merely raises the issue without answering it. The fact that Congress carefully rewrote the relevant section in a way that makes the defendant's right significantly more valuable tends to support the conclusion that the changes in language were deliberate and should not be ignored. See *Union Bank* v. *Wolas*, 502 U. S. 151 (1991); *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 179 (1980). Recognizing the district court's authority to enter an appropriate order at the conclusion of the sentencing hearing is entirely consistent with a congressional purpose to enhance the value of this right.

III

No statutory policy would be adversely affected by recognizing the district court's authority to make the initial credit determination in appropriate cases, and in fact, two important policies would be served. First, as the Court of Appeals for the Ninth Circuit has observed, see n. 10, *supra*, allowing the district court, in its discretion, to compute the credit when the sentence is imposed furthers the interest in providing prisoners with prompt, accurate, and precise information about the time they must spend in prison. This policy is expressly identified in the Senate Report describing

---

tute custody for purposes of credit; in *Ramsey* v. *Brennan*, 878 F. 2d 995, 996 (1989), the Seventh Circuit would not credit the time that Ramsey spent in a halfway house while awaiting trial, and in *United States* v. *Woods*, 888 F. 2d, at 656, the Tenth Circuit held that Woods was not entitled to credit for the time he spent at a residential treatment center when he was out on bond. In each of these cases, the issue was ripe for decision at the sentencing hearing.

the value of a procedure "whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called 'good time.'" S. Rep. No. 98–225, p. 46 (1983).[12]

Second, and of even greater importance, allowing the district court to make the credit determination furthers the interest in uniform and evenhanded sentencing that is the centerpiece of the entire Sentencing Reform Act of 1984. When there are disputed issues that must be resolved by a judge, an adversarial proceeding, in which the parties are represented by counsel and the proceeding takes place in open court and on the record, is the best guarantee of a fair and accurate decision.[13] The convicted defendant is represented by trial counsel at the time of sentencing, but usually must fend for himself after he is incarcerated. Committing the decision to the Attorney General after the defendant has begun to serve his sentence, particularly if he must serve his sentence in some facility remote from the district of conviction, can only minimize the effective participation of defense counsel. Indeed, it may generate meritless *pro se* claims for credit that could be avoided by prompt consideration at sentencing, as well as complicate and delay the disposition of meritorious claims. A flexible approach that allows the judge to decide when, and how, the credit determination

---

[12] As the Senate Report made clear, one objective of the Act was to redress the situation in which "prisoners often do not really know how long they will spend in prison until the very day they are released." S. Rep. No. 98–225, at 49.

[13] Several States have recognized the advantages of assigning to the court the task of calculating jail credit. See Fla. Stat. § 921.161 (1991) ("A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence"); see also Cal. Penal Code Ann. § 2900.5(d) (West Supp. 1992); Mass. Gen. Laws § 279:33A (1990).

should be made is fully consistent with the purposes of the statute and with its text.[14]

For the foregoing reasons, I would affirm the judgment of the Court of Appeals.

---

[14] The information required for the sentencing judge to make a credit determination could easily become part of the information that is routinely provided to the judge in the presentence report. Such a report already contains the convicted offender's prior criminal history, which includes much of the information necessary to decide whether he is eligible for credit for time in custody. The report could contain the amount of jail credit the person is entitled to, and if there are other sentences pending or unserved, a recommendation whether the current sentence should be concurrent or consecutive to any prior sentences.

Syllabus

SUTER ET AL. *v.* ARTIST M. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 90–1488. Argued December 2, 1991—Decided March 25, 1992

The Adoption Assistance and Child Welfare Act of 1980 provides that a State will be reimbursed by the Federal Government for certain expenses it incurs in administering foster care and adoption services, if it submits a plan for approval by the Secretary of Health and Human Services. Among its requisite features, an approved plan must provide that it "shall be in effect in all" of a State's political subdivisions and "be mandatory upon them," 42 U. S. C. § 671(a)(3), and that "reasonable efforts will be made" to prevent removal of children from their homes and to facilitate reunification of families where removal has occurred, § 671(a)(15). Respondents, child beneficiaries of the Act, sought declaratory and injunctive relief, alleging that petitioners, the Director and the Guardianship Administrator of the Illinois agency responsible for investigating charges of child abuse and neglect and providing services for abused and neglected children and their families, had failed to make reasonable efforts to preserve and reunite families, in contravention of § 671(a)(15). The District Court denied petitioners' motion to dismiss, holding, *inter alia*, that the Act contained an implied cause of action and that suit could also be brought under 42 U. S. C. § 1983. The court entered an injunction against petitioners, and the Court of Appeals affirmed. That court relied on *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, to hold that the "reasonable efforts" clause of the Act could be enforced through a § 1983 action, and applied the standard of *Cort* v. *Ash*, 422 U. S. 66, to find that the Act created an implied right of action entitling respondents to bring suit directly under the Act.

Held:

1. Section 671(a)(15) does not confer on its beneficiaries a private right enforceable in a § 1983 action. Pp. 355–364.

(a) Section 1983 is not available to enforce a violation of a federal statute where Congress has foreclosed enforcement in the enactment itself and "where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423. Congress must confer such rights unambiguously when it intends to impose conditions on the grant of federal moneys. *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17. Thus, statutory provisions must

be analyzed in detail, in light of the entire legislative enactment, to determine whether the language in question created rights within the meaning of § 1983. Pp. 355–357.

(b) Congress did not unambiguously confer upon the Act's beneficiaries the right to enforce the "reasonable efforts" requirement. The Act is mandatory only insofar as it requires a State to have an approved plan containing the listed features; and it is undisputed that the Illinois plan provides that reasonable efforts at prevention and reunification will be made. Respondents err in basing their § 1983 argument, in part, on § 671(a)(3)'s "in effect" language, which is directed to the requirement that the plan apply to all of a State's political subdivisions and is not intended to otherwise modify the word "plan." Unlike the Medicaid legislation in *Wilder, supra*—which actually required the States to adopt reasonable and adequate reimbursement rates for health care providers and which, along with regulations, set forth in some detail the factors to be considered in determining the methods for calculating rates—here, the statute provides no further guidance as to how "reasonable efforts" are to be measured, and, within broad limits, lets the State decide how to comply with the directive. Since other sections of the Act provide mechanisms for the Secretary to enforce the "reasonable efforts" clause, the absence of a § 1983 remedy does not make the clause a dead letter. The regulations also are not specific and provide no notice that failure to do anything other than submit a plan with the requisite features is a further condition on the receipt of federal funds. And the legislative history indicates that the Act left a great deal of discretion to the States to meet the "reasonable efforts" requirement. Pp. 358–363.

2. The Act does not create an implied cause of action for private enforcement. Respondents have failed to demonstrate that Congress intended to make such a remedy available. See *Cort, supra; Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16. Pp. 363–364.

917 F. 2d 980, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 364.

Christina M. Tchen, Special Assistant Attorney General of Illinois, argued the cause for petitioners. With her on

the briefs were *Susan Getzendanner*, *Charles F. Smith*, and *Kimberley K. Baer*, Special Assistant Attorneys General.

Deputy Solicitor General Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Michael R. Dreeben*, and *Anthony J. Steinmeyer*.

Michael G. Dsida argued the cause for respondents. With him on the brief were *Patrick T. Murphy* and *Lee Ann Lowder*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of Louisiana et al. by *William J. Guste, Jr.*, Attorney General of Louisiana, and *Jesse James Marks* and *David A. Dalia*, Assistant Attorneys General, *James H. Evans*, Attorney General of Alabama, *Grant Woods*, Attorney General of Arizona, *Daniel E. Lungren*, Attorney General of California, *Gale A. Norton*, Attorney General of Colorado, *Charles M. Oberly III*, Attorney General of Delaware, *John Payton*, Corporation Counsel of the District of Columbia, *Michael J. Bowers*, Attorney General of Georgia, *Warren Price III*, Attorney General of Hawaii, *Larry EchoHawk*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Bonnie J. Campbell*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *Michael E. Carpenter*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Frankie Sue Del Papa*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Lee Fisher*, Attorney General of Ohio, *Susan Brimer Loving*, Attorney General of Oklahoma, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Mark W. Barnett*, Attorney General of South Dakota, *Paul Van Dam*, Attorney General of Utah, *Jan C. Graham*, Solicitor General, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Ken Eikenberry*, Attorney General

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case raises the question whether private individuals have the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980 (Adoption Act or Act), 94 Stat. 500, 42 U. S. C. §§ 620–628, 670–679a, either under the Act itself or through an action under 42 U. S. C. § 1983.[1] The Court of Appeals for the Seventh Circuit held that 42 U. S. C. § 671(a)(15) contained an implied right of action, and that respondents could enforce this section of the Act through an action brought under § 1983 as well. We hold that the Act does not create an enforceable right on behalf of respondents.

The Adoption Act establishes a federal reimbursement program for certain expenses incurred by the States in ad-

---

of Washington, and *Mario J. Palumbo*, Attorney General of West Virginia; and for the Council of State Governments et al. by *Richard Ruda* and *Charles Rothfeld*.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Protecting Children et al. by *James D. Weill* and *Robert G. Schwartz*; for the American Bar Association by *Talbot S. D'alemberte*; for the Illinois State Bar Association et al. by *Robert E. Lehrer, Dennis A. Rendleman, Roger B. Derstine, Richard L. Mandel, John J. Casey, Michael A. O'Connor, Alexander Polikoff, Roslyn C. Lieb, Gary H. Palm*, and *Thomas F. Geraghty*; and for the National Association of Counsel for Children et al. by *Christopher A. Hansen, John A. Powell, Harvey M. Grossman, Ira A. Burnim, Henry Weintraub, Martha Bergmark*, and *Mark Soler*.

Kenneth C. Bass III, Thomas J. Madden, and *Jeffrey Kuhn* filed a brief for the National Council of Juvenile and Family Court Judges as *amicus curiae*.

[1] Section 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

ministering foster care and adoption services. The Act provides that States will be reimbursed for a percentage of foster care and adoption assistance payments when the State satisfies the requirements of the Act. 42 U. S. C. §§ 672–674, 675(4)(A) (1988 ed. and Supp. I).

To participate in the program, States must submit a plan to the Secretary of Health and Human Services for approval by the Secretary. §§ 670, 671. Section 671 lists 16 qualifications which state plans must contain in order to gain the Secretary's approval. As relevant here, the Act provides:

> "(a) Requisite features of State plan
>
> "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> . . . . . .
>
> "(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;
>
> . . . . . .
>
> "(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . . ." §§ 671(a)(3), (15).

Petitioners in this action are Sue Suter and Gary T. Morgan, the Director and the Guardianship Administrator, respectively, of the Illinois Department of Children and Family Services (DCFS). DCFS is the state agency responsible for, among other things, investigating charges of child abuse and neglect and providing services to abused and neglected children and their families. DCFS is authorized under Illinois law, see Ill. Rev. Stat., ch. 37, ¶ 802–1 *et seq.* (1989), to gain temporary custody of an abused or neglected child after a

hearing and order by the Juvenile Court. Alternatively, the court may order that a child remain in his home under a protective supervisory order entered against his parents. See *Artist M.* v. *Johnson*, 917 F. 2d 980, 982–983 (CA7 1990). Once DCFS has jurisdiction over a child either in its temporary custody, or in the child's home under a protective order, all services are provided to the child and his family by means of an individual caseworker at DCFS to whom the child's case is assigned. App. 35–39.

Respondents filed this class-action suit seeking declaratory and injunctive relief under the Adoption Act.[2] They alleged that petitioners, in contravention of 42 U. S. C. § 671(a)(15), failed to make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred.[3] This failure occurred, as alleged by respondents, because DCFS failed promptly to assign caseworkers to children placed in DCFS custody and promptly to reassign cases when caseworkers were on leave from DCFS. App. 6–8. The District Court, without objection from petitioners, certified two separate classes seeking relief, including all children who are or will be wards of DCFS and are placed in foster care or remain in their homes under a judicial protective order.[4] *Artist M.* v.

---

[2] Count III of the complaint alleged that petitioners violated the Due Process Clause of the Constitution. App. 26. This count was dismissed by the District Court and was not appealed. *Artist M.* v. *Johnson*, 917 F. 2d 980, 982, n. 3 (CA7 1990).

[3] Although DCFS administers the child welfare program for the entire State of Illinois, respondents only alleged violations of the Adoption Act as to Cook County. App. 6.

[4] Specifically, the following classes were certified by the District Court: "Class A: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in the Circuit Court of Cook County, Juvenile Division ('Juvenile Court'), who are or will be in the custody of [DCFS] or in

Johnson, 726 F. Supp. 690, 691 (ND Ill. 1989). The District Court denied a motion to dismiss filed by petitioners, holding, as relevant here, that the Adoption Act contained an implied cause of action and that suit could also be brought to enforce the Act under 42 U. S. C. § 1983. 726 F. Supp., at 696, 697.

The District Court then entered an injunction requiring petitioners to assign a caseworker to each child placed in DCFS custody within three working days of the time the case is first heard in Juvenile Court, and to reassign a caseworker within three working days of the date any caseworker relinquishes responsibility for a particular case. App. to Pet. for Cert. 56a. The 3-working-day deadline was found by the District Court to "realistically reflec[t] the institutional capabilities of DCFS," *id.*, at 55a, based in part on petitioners' assertion that assigning caseworkers within that time frame "would not be overly burdensome." *Id.*, at 54a. The District Court, on partial remand from the Court of Appeals, made additional factual findings regarding the nature of the delays in assigning caseworkers and the progress of DCFS reforms at the time the preliminary injunction was entered. App. 28–50.

The Court of Appeals affirmed. 917 F. 2d 980 (CA7 1990). Relying heavily on this Court's decision in *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498 (1990), the Court of Ap-

---

a home under DCFS supervision by an order of Juvenile Court and who are now or will be without a DCFS caseworker for a significant period of time.

"Class B: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time." *Artist M.* v. *Johnson*, 726 F. Supp. 690, 691 (ND Ill. 1989).

The "Class B" plaintiffs only raised a constitutional due process claim, which was dismissed by the District Court. See n. 2, *supra*.

peals held that the "reasonable efforts" clause of the Adoption Act could be enforced through an action under § 1983. 917 F. 2d, at 987–989.[5] That court, applying the standard established in *Cort* v. *Ash*, 422 U. S. 66 (1975), also found that the Adoption Act created an implied right of action such that private individuals could bring suit directly under the Act to enforce the provisions relied upon by respondents. 917 F. 2d, at 989–991. We granted certiorari, 500 U. S. 915 (1991), and now reverse.[6]

---

[5] The Court of Appeals also noted that the Fourth Circuit, in *L. J. ex rel. Darr* v. *Massinga*, 838 F. 2d 118 (1988), cert. denied, 488 U. S. 1018 (1989), had found the substantive requirements listed in § 671(a) to be enforceable under § 1983. 917 F. 2d, at 988.

Several cases have addressed the enforceability of various sections of the Adoption Act. See, *e. g.*, *Massinga*, *supra*, at 123 (finding case plan requirements enforceable under § 1983); *Lynch* v. *Dukakis*, 719 F. 2d 504 (CA1 1983) (same); *Norman* v. *Johnson*, 739 F. Supp. 1182 (ND Ill. 1990) (finding "reasonable efforts" clause enforceable under § 1983); *B. H.* v. *Johnson*, 715 F. Supp. 1387, 1401 (ND Ill. 1989) (finding "reasonable efforts" clause not enforceable under § 1983).

[6] Subsequent to oral argument, respondents notified the Court of the entry of a consent decree in the case of *B. H.* v. *Suter*, No. 88–C 5599 (ND Ill.), which they suggest may affect our decision on the merits, or indeed may make the instant action moot. We find no merit to respondents' contentions, and conclude that the *B. H.* consent decree has no bearing on the issue the Court decides today. Sue Suter, petitioner in this case, is the defendant in the *B. H.* suit, which alleges statewide deficiencies in the operations of DCFS. See *B. H.* v. *Johnson*, *supra*. The class approved in *B. H.* contains "all persons who are or will be in the custody of [DCFS] and who have been or will be placed somewhere other than with their parents." 715 F. Supp., at 1389.

Respondents suggest that because petitioner has agreed in the *B. H.* consent decree to provide "reasonable efforts" to maintain and reunify families, she is somehow precluded from arguing in this case that § 671(a)(15) does not grant a right for individual plaintiffs to enforce that section by suit. As we have recognized previously this Term, however, parties may agree to provisions in a consent decree which exceed the requirements of federal law. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367, 389 (1992). Paragraph two of the *B. H.* decree itself provides that the decree is not an admission of any factual or legal issue. In addi-

In *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), we first established that § 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations. We have subsequently recognized that § 1983 is not available to enforce a violation of a federal statute "where Congress has foreclosed such enforcement of the statute in the enactment

---

tion, the *B. H.* consent decree does not require "reasonable efforts" with no further definition, but rather defines the standard against which those efforts are to be measured. See *B. H.* Consent Decree ¶¶ 8, 16(a), pp. 12, 20. Thus, the agreement embodied in the consent decree is not inconsistent with the position petitioner asserts here, namely, that § 671(a)(15) requiring "reasonable efforts," without further definition, does not create an enforceable right on behalf of respondents to enforce the clause by suit.

Respondents next contend that the *B. H.* decree "may also render much of this case moot." Supp. Brief for Respondents 8. Although petitioner here is the defendant in *B. H.*, the class certified in *B. H.* does not include children living at home under a protective order, and therefore is more narrow than the class certified in the instant suit. In addition, while DCFS agrees in the *B. H.* consent decree to certain obligations, for example, a ceiling on the number of cases handled by each caseworker, none of these obligations subsumes the injunction entered by the District Court and affirmed by the Court of Appeals below, requiring petitioners to provide a caseworker within three days of when a child is first removed from his home. Cf. *Johnson* v. *Board of Ed. of Chicago*, 457 U. S. 52 (1982) *(per curiam)*.

In short, the situation in this case is quite different from that in the cases cited by respondents in which this Court remanded for further proceedings after events subsequent to the filing of the petition for certiorari or the grant of certiorari affected the case before the Court. Unlike the parties in *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U. S. 115 (1959) *(per curiam)*, the parties in the case before the Court have not entered a consent decree. Unlike *Kremens* v. *Bartley*, 431 U. S. 119 (1977), the *B. H.* decree does nothing to change the class at issue or the claims of the named class members. And unlike *American Foreign Service Assn.* v. *Garfinkel*, 490 U. S. 153 (1989) *(per curiam)*, where we noted that "[e]vents occurring since the District Court issued its ruling place this case in a light far different from the one in which that court considered it," *id.*, at 158, the issue whether the reasonable efforts clause creates an enforceable right on behalf of respondents is the same now as it was when decided by the District Court below.

itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423 (1987).

In *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), we held that § 111 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U. S. C. § 6010 (1976 ed. and Supp. III), did not confer an implied cause of action. That statute, as well as the statute before us today, was enacted by Congress pursuant to its spending power.[7] In *Pennhurst*, we noted that it was well established that Congress has the power to fix the terms under which it disburses federal money to the States. 451 U. S., at 17, citing *Oklahoma* v. *United States Civil Service Comm'n*, 330 U. S. 127 (1947); *Rosado* v. *Wyman*, 397 U. S. 397 (1970). As stated in *Pennhurst:*

> "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." 451 U. S., at 17 (citations and footnote omitted).

We concluded that the statutory section sought to be enforced by the *Pennhurst* respondents did not provide such unambiguous notice to the States because it spoke in terms "intended to be hortatory, not mandatory." *Id.*, at 24.

In *Wright*, the Brooke Amendment to existing housing legislation imposed a ceiling on the rent which might be charged low-income tenants living in public housing projects.

---

[7] Article I, § 8, cl. 1, of the Constitution contains the spending power, which provides, "Congress shall have Power to . . . provide for the . . . general Welfare of the United States."

The regulations issued by the Department of Housing and Urban Development in turn defined rent to include "'a reasonable amount for [use of] utilities,'" and further defined how that term would be measured. *Wright, supra,* at 420–421, n. 3. We held that tenants had an enforceable right to sue the Housing Authority for utility charges claimed to be in violation of these provisions. In *Wilder,* 496 U. S., at 503, the Boren Amendment to the Medicaid Act required that Medicaid providers be reimbursed according to rates that the "'State finds, and makes assurances satisfactory to the Secretary,'" are "'reasonable and adequate'" to meet the costs of "'efficiently and economically operated facilities.'" Again, we held that this language created an enforceable right, on the part of providers seeking reimbursement, to challenge the rates set by the State as failing to meet the standards specified in the Boren Amendment.

In both *Wright* and *Wilder* the word "reasonable" occupied a prominent place in the critical language of the statute or regulation, and the word "reasonable" is similarly involved here. But this, obviously, is not the end of the matter. The opinions in both *Wright* and *Wilder* took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created "enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright, supra,* at 423. And in *Wilder,* we caution that "'[s]ection 1983 speaks in terms of "*rights,* privileges, or immunities," not violations of federal law.'" *Wilder, supra,* at 509, quoting *Golden State Transit Corp.* v. *Los Angeles,* 493 U. S. 103, 106 (1989).

Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make "reasonable efforts" to prevent a child from being removed from his home, and once removed to reunify the child with his family? We turn now to that inquiry.

As quoted above, 42 U. S. C. § 671(a)(15) requires that to obtain federal reimbursement, a State have a plan which "provides that, in each case, reasonable efforts will be made . . . to prevent or eliminate the need for removal of the child from his home, and . . . to make it possible for the child to return to his home . . . ." As recognized by petitioners, respondents, and the courts below, the Act is mandatory in its terms. However, in the light shed by *Pennhurst*, we must examine exactly what is required of States by the Act. Here, the terms of § 671(a) are clear: "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary." Therefore the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features.[8]

Respondents do not dispute that Illinois in fact has a plan approved by the Secretary which provides that reasonable efforts at prevention and reunification will be made. Tr. of Oral Arg. 29–30.[9] Respondents argue, however, that § 1983

---

[8] Contrary to respondents' assertion that finding 42 U. S. C. § 671(a) to require only the filing of a plan for approval by the Secretary would add a new "prerequisite for the existence of a right under § 1983," Brief for Respondents 22, n. 6, our holding today imposes no new "prerequisites" but merely counsels that each statute must be interpreted by its own terms.

[9] The state plan filed by Illinois relies on a state statute and DCFS internal rules to meet the "reasonable efforts" requirement. Department of Health and Human Services, Office of Human Development Services Administration for Children, Youth and Families, Children's Bureau, State Plan for Title IV–E of the Social Security Act Foster Care and Adoption Assistance, State Illinois 2–13 (1988).

The Illinois statute to which the plan refers imposes a requirement that before temporary custody may be ordered, the court must find that reasonable efforts have been made or good cause has been shown why "reasonable efforts cannot prevent or eliminate the necessity of removal of the minor from his or her home." Ill. Rev. Stat., ch. 37, ¶ 802–10(2) (1989). The statute further provides: "The Court shall require documentation by representatives of [DCFS] or the probation department as to the reason-

allows them to sue in federal court to obtain enforcement of this particular provision of the state plan. This argument is based, at least in part, on the assertion that 42 U. S. C. § 671(a)(3) requires that the State have a plan which is "in effect." This section states that the state plan shall "provid[e] that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." But we think that "in effect" is directed to the requirement that the plan apply to all political subdivisions of the State, and is not intended to otherwise modify the word "plan."[10]

In *Wilder*, the underlying Medicaid legislation similarly required participating States to submit to the Secretary of Health and Human Services a plan for medical assistance describing the State's Medicaid program. But in that case we held that the Boren Amendment actually required the States to adopt reasonable and adequate rates, and that this obligation was enforceable by the providers. We relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates. *Wilder*, 496 U. S., at 519, n. 17.

In the present case, however, the term "reasonable efforts" to maintain an abused or neglected child in his home,

---

able efforts that were made to prevent or eliminate the necessity of removal of the minor from his or her home, and shall consider the testimony of any person as to those reasonable efforts." *Ibid.*

[10] Respondents also based their claim for relief on 42 U. S. C. § 671(a)(9) which states that the state plan shall "provid[e] that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency . . . ."

As this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents anymore than does the "reasonable efforts" clause of § 671(a)(15).

or return the child to his home from foster care, appears in quite a different context. No further statutory guidance is found as to how "reasonable efforts" are to be measured. This directive is not the only one which Congress has given to the States, and it is a directive whose meaning will obviously vary with the circumstances of each individual case. How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State.

Other sections of the Act provide enforcement mechanisms for the "reasonable efforts" clause of 42 U. S. C. § 671(a)(15). The Secretary has the authority to reduce or eliminate payments to a State on finding that the State's plan no longer complies with § 671(a) or that "there is a substantial failure" in the administration of a plan such that the State is not complying with its own plan. § 671(b). The Act also requires that in order to secure federal reimbursement for foster care payments made with respect to a child involuntarily removed from his home the removal must be "the result of a judicial determination to the effect that continuation [in the child's home] would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made." § 672(a)(1). While these statutory provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983,[11] they do show that the absence of a remedy to pri-

[11] We have found an intent by Congress to foreclose remedies under § 1983 where the statute itself provides a comprehensive remedial scheme which leaves no room for additional private remedies under § 1983. *Smith* v. *Robinson*, 468 U. S. 992 (1984); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981). We need not consider this question today due to our conclusion that the Adoption Act does not create the federally enforceable right asserted by respondents.

vate plaintiffs under § 1983 does not make the "reasonable efforts" clause a dead letter.[12]

The regulations promulgated by the Secretary to enforce the Adoption Act do not evidence a view that § 671(a) places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary.[13] The regulations provide that to meet the requirements of § 671(a)(15) the case plan for each child must "include a description of the services offered and the services provided to prevent removal of the child from the home and to reunify the family." 45 CFR § 1356.21(d)(4) (1991). Another regulation, entitled "requirements and submittal," provides that a state plan must specify "which preplacement preventive and reunification services are available to children and families in need." § 1357.15(e)(1).[14] What is

---

[12] The language of other sections of the Act also shows that Congress knew how to impose precise requirements on the States aside from the submission of a plan to be approved by the Secretary when it intended to. For example, 42 U. S. C. § 672(e) provides that "[n]o Federal payment may be made under this part" for a child voluntarily placed in foster care for more than 180 days unless within that period there is a judicial determination that the placement is in the best interest of the child. That the "reasonable efforts" clause is not similarly worded buttresses a conclusion that Congress had a different intent with respect to it.

[13] Cf. *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 430–432 (1987) (statute providing that tenants in low-income housing could only be charged 30% of their income as rent, in conjunction with regulations providing that "reasonable utilities" costs were included in the rental figure, created right under § 1983 to not be charged more than a "reasonable" amount for utilities).

[14] The regulation, 45 CFR § 1357.15(e)(2) (1991), goes on to provide a list of which services may be included in the State's proposal:

"Twenty-four hour emergency caretaker, and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing children's removal from home; other services which the agency identifies as necessary and appropriate such as home-based family serv-

significant is that the regulations are not specific and do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government. Respondents contend that "[n]either [petitioners] nor amici supporting them present any legislative history to refute the evidence that Congress intended 42 U. S. C. § 671(a)(15) to be enforceable." Brief for Respondents 33. To the extent such history may be relevant, our examination of it leads us to conclude that Congress was concerned that the required reasonable efforts be made by the States, but also indicated that the Act left a great deal of discretion to them.[15]

---

ices, self-help groups, services to unmarried parents, provision of, or arrangements for, mental health, drug and alcohol abuse counseling, vocational counseling or vocational rehabilitation; and post adoption services."

[15] The Report of the Senate Committee on Finance describes how under the system before the Adoption Act States only received reimbursement for payments made with respect to children who were removed from their homes, and how the Act contains a number of provisions in order to "deemphasize the use of foster care," including reimbursing States for developing and administering adoption assistance programs and programs for "tracking" children in foster care, placing a cap on the amount of federal reimbursements a State may receive for foster care maintenance payments, and "specifically permitting expenditures for State . . . services to reunite families." S. Rep. No. 96–336, p. 12 (1979). This Senate Report shows that Congress had confidence in the ability and competency of state courts to discharge their duties under what is now § 672(a) of the Act. *Id.*, at 16 ("The committee is aware of allegations that the judicial determination requirement can become a mere *pro forma* exercise in paper shuffling to obtain Federal funding. While this could occur in some instances, the committee is unwilling to accept as a general proposition that the judiciaries of the States would so lightly treat a responsibility placed upon them by Federal statute for the protection of children").

The House Ways and Means Committee Report on the Adoption Act similarly recognizes that "the entire array of possible preventive services are not appropriate in all situations. The decision as to the appropriate-

Careful examination of the language relied upon by respondents, in the context of the entire Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.

Having concluded that § 671(a)(15) does not create a federally enforceable right to "reasonable efforts" under § 1983, the conclusion of the Court of Appeals that the Adoption Act contains an implied right of action for private enforcement, 917 F. 2d, at 989, may be disposed of quickly. Under the familiar test of *Cort* v. *Ash*, 422 U. S. 66 (1975), the burden is on respondents to demonstrate that Congress intended to make a private remedy available to enforce the "reasonable

---

ness of specific services in specific situations will have to be made by the administering agency having immediate responsibility for the care of the child." H. R. Rep. No. 96–136, p. 47 (1979).

Remarks on the floor of both the House and the Senate further support these general intentions. See, *e. g.*, 125 Cong. Rec. 22113 (1979) (remarks of Rep. Brodhead) ("What the bill attempts to do is to get the States to enact a series of reforms of their foster care laws, because in the past there has been too much of a tendency to use the foster care program. The reason there has been that tendency is because . . . it becomes a little more expensive for the State to use the protective services than foster care. Through this bill, we want to free up a little bit of money . . . so you will have an incentive to keep a family together"); *id.*, at 29939 (remarks of Sen. Cranston, sponsor of the Adoption Act) ("This requirement in the State plan under [§ 671(a)(15)] would be reinforced by the new requirement under [§ 672] that each State with a plan approved . . . may make foster care maintenance payments only for a child who has been removed from a home as a result of an explicit judicial determination that reasonable efforts to prevent the removal have been made, in addition to the judicial determination required by existing law that continuation in the home would be contrary to the welfare of the child").

efforts" clause of the Adoption Act.[16] The most important inquiry here as well is whether Congress intended to create the private remedy sought by the plaintiffs. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted"). As discussed above, we think that Congress did not intend to create a private remedy for enforcement of the "reasonable efforts" clause.

We conclude that 42 U. S. C. § 671(a)(15) neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf.

The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

The Adoption Assistance and Child Welfare Act of 1980 (Adoption Act or Act) conditions federal funding for state child welfare, foster care, and adoption programs upon, *inter alia*, the State's express commitment to make, "in each case, reasonable efforts" to prevent the need for removing children from their homes and "reasonable efforts," where removal has occurred, to reunify the family. 42 U. S. C. § 671(a)(15). The Court holds today that the plaintiff chil-

---

[16] As established in *Cort* v. *Ash*, 422 U. S. 66 (1975), these factors are: "First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.*, at 78 (internal quotation marks omitted; emphasis in original).

dren in this case may not enforce the State's commitment in federal court either under 42 U. S. C. § 1983 or under the Act itself.

In my view, the Court's conclusion is plainly inconsistent with this Court's decision just two Terms ago in *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498 (1990), in which we found enforceable under § 1983 a functionally identical provision of the Medicaid Act requiring "reasonable" reimbursements to health-care providers. More troubling still, the Court reaches its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under § 1983. I cannot acquiesce in this unexplained disregard for established law. Accordingly, I dissent.

I

A

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities, secured by the Constitution and laws" of the United States. We recognized in *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), that § 1983 provides a cause of action for violations of federal statutes, not just the Constitution. Since *Thiboutot*, we have recognized two general exceptions to this rule. First, no cause of action will lie where the statute in question does not "'create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Wilder*, 496 U. S., at 508 (quoting *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 423 (1987)). Second, § 1983 is unavailable where "Congress has foreclosed such enforcement of the statute in the enactment itself." 496 U. S., at 508.

In determining the scope of the first exception—whether a federal statute creates an "enforceable right"—the Court has developed and repeatedly applied a three-part test. We have asked (1) whether the statutory provision at issue "'was intend[ed] to benefit the putative plaintiff.'" *Id.*, at

509 (quoting *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 106 (1989)). If so, then the provision creates an enforceable right unless (2) the provision "reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit," 496 U. S., at 509 (quoting *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 19 (1981)), or unless (3) the plaintiff's interest is so "'vague and amorphous'" as to be "'beyond the competence of the judiciary to enforce.'" 496 U. S., at 509 (quoting *Golden State*, 493 U. S., at 106, in turn quoting *Wright*, 479 U. S., at 431–432). See also *Dennis* v. *Higgins*, 498 U. S. 439, 448–449 (1991) (quoting and applying the three-part test as stated in *Golden State*). The Court today has little difficulty concluding that the plaintiff children in this case have no enforceable rights, because it does not mention—much less apply—this firmly established analytic framework.

B

In *Wilder*, we held that under the above three-part test, the Boren Amendment to the Medicaid Act creates an enforceable right. As does the Adoption Act, the Medicaid Act provides federal funding for state programs that meet certain federal standards and requires participating States to file a plan with the Secretary of Health and Human Services. Most relevant here, the Medicaid Act, like the Adoption Act, requires that the State undertake a "reasonableness" commitment in its plan. With respect to the rate at which providers are to be reimbursed, the Boren Amendment requires:

> "A State plan for medical assistance must—
>
> . . . . .
>
> "provide . . . for payment . . . [of services] provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State . . .) which the State finds, and makes assurances satisfactory to the Secretary, are *reasonable and*

> *adequate* to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have *reasonable* access . . . to inpatient hospital services of *adequate* quality." 42 U. S. C. § 1396a(a)(13)(A) (emphasis supplied).

In *Wilder*, we had no difficulty concluding that the reimbursement provision of the Boren Amendment "was intend[ed] to benefit" the plaintiff providers of Medicaid services. 496 U. S., at 509. We also concluded that the second part of the test was satisfied. The amendment, we held, does not simply express a "congressional preference" for reasonable and adequate reimbursement rates; rather, it imposes a "binding obligation" on the State to establish and maintain such rates. *Id.*, at 512. In so concluding, we emphasized two features of the Medicaid reimbursement scheme. First, we observed that the language of the provision is "cast in mandatory rather than precatory terms," stating that the plan "*must*" provide for reasonable and adequate reimbursement. *Ibid.* Second, we noted that the text of the statute expressly conditions federal funding on state compliance with the amendment and requires the Secretary to withhold funds from noncomplying States. *Ibid.* In light of these features of the Medicaid Act, we rejected the argument, advanced by the defendant state officials and by the United States as *amicus curiae*, that the only enforceable state obligation is the obligation to file a plan with the Secretary, to find that its rates are reasonable and adequate, and to make assurances to that effect in the plan. *Id.*, at 512–515. Rather, we concluded, participating States are required actually to provide reasonable and adequate rates, not just profess to the Secretary that they have done so. *Ibid.*

Finally, we rejected the State's argument that Medicaid providers' right to "reasonable and adequate" reimburse-

ment is "too vague and amorphous" for judicial enforcement. We acknowledged that the State has "substantial discretion" in choosing among various methods of calculating reimbursement rates. *Id.*, at 519; see also *id.*, at 505–508. A State's discretion in determining how to calculate what rates are "reasonable and adequate," we concluded, "may affect the standard under which a court reviews" the State's reimbursement plan, but it does not make the right to reasonable reimbursement judicially unenforceable. *Id.*, at 519.

C

These principles, as we applied them in *Wilder*, require the conclusion that the Adoption Act's "reasonable efforts" clause[1] establishes a right enforceable under § 1983. Each of the three elements of our three-part test is satisfied. First, and most obvious, the plaintiff children in this case are clearly the intended beneficiaries of the requirement that the State make "reasonable efforts" to prevent unnecessary removal and to reunify temporarily removed children with their families.

Second, the "reasonable efforts" clause imposes a binding obligation on the State because it is "cast in mandatory rather than precatory terms," providing that a participating State "*shall* have a plan approved by the Secretary which . . . *shall be in effect* in all political subdivisions of the State, and, if administered by them, be *mandatory* upon them." Further, the statute requires the plan to "provid[e] that, in each case, reasonable efforts *will be made.*" Moreover, as

[1] "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—. . . (3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; [and] . . . (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U. S. C. § 671(a).

in *Wilder*, the statutory text expressly conditions federal funding on state compliance with the plan requirement and requires the Secretary to reduce payments to a State if "in the administration of [the State's] plan there is a substantial failure to comply with the provisions of the plan." 42 U. S. C. § 671(b). Under our holding in *Wilder*, these provisions of the Adoption Act impose a binding obligation on the State. Indeed, neither the petitioner state officials nor *amicus* United States dispute this point. Brief for Petitioners 17; Reply Brief for Petitioners 3, n. 2; Brief for United States as *Amicus Curiae* 13–14.

What petitioners and *amicus* United States do dispute is whether the third element of the *Golden State-Wilder-Dennis* test has been satisfied: They argue that the "reasonable efforts" clause of the Adoption Act is too "vague and amorphous" to be judicially enforced. Aware that *Wilder* enforced an apparently similar "reasonableness" clause, they argue that *this* clause is categorically different.

According to petitioners, the Court would not have found the Boren Amendment's reasonableness clause enforceable had the statute not provided an "objective benchmark" against which "reasonable and adequate" reimbursement rates could be measured. Reasonable and adequate rates, the Boren Amendment provides, are those that meet the costs that would be incurred by "an 'efficiently and economically operated facilit[y]' providing care in compliance with federal and state standards while at the same time ensuring 'reasonable access' to eligible participants." *Wilder*, 496 U. S., at 519 (quoting 42 U. S. C. § 1396a(a)(13)(A)). Petitioners claim that, given this benchmark, "reasonable and adequate" rates can be ascertained by "*monetary* calculations easily determined based on prevailing rates in the market." Brief for Petitioners 21. By contrast, they observe, there is "no market for 'reasonable efforts' to keep or return a child home, and such 'reasonable efforts' cannot be calculated or quantified." *Ibid.*

Petitioners misunderstand the sense in which the "benchmark" in *Wilder* is "objective." The Boren Amendment does not simply define "reasonable and adequate" rates as market rates. Rather, it defines a "reasonable and adequate" rate by referring to what *would* be provided by a *hypothetical* facility—one that operates "efficiently and economically," "compli[es] with federal and state standards," and "ensur[es] 'reasonable access' to eligible participants." Whether particular existing facilities meet those criteria is not a purely empirical judgment that requires only simple "monetary calculations." Indeed, the Boren Amendment's specification of the words "reasonable and adequate" ultimately refers us to a *second* reasonableness clause: The "benchmark" facility, we are told, is one that "ensure[s] '*reasonable access*' to eligible participants." This second reasonableness clause is left undefined. Contrary to petitioners' suggestions, then, the "reasonable and adequate" rates provision of the Boren Amendment is not "objective" in the sense of being mechanically measurable. The fact that this Court found the provision judicially enforceable demonstrates that an asserted right is not "vague and amorphous" simply because it cannot be easily "calculated or quantified."

Petitioners also argue that the right to "reasonable efforts" is "vague and amorphous" because of substantial disagreement in the child-welfare community concerning appropriate strategies. Furthermore, they contend, because the choice of a particular strategy in a particular case necessarily will depend upon the facts of that case, a court-enforced right to reasonable efforts either will homogenize very different situations or else will fragment into a plurality of "rights" that vary from State to State. For both of these reasons, petitioners contend, Congress left the question of what efforts are "reasonable" to state juvenile courts, the recognized experts in such matters.

Here again, comparison with *Wilder* is instructive. The Court noted the lack of consensus concerning which of vari-

ous possible methods of calculating reimbursable costs would best promote efficient operation of health-care facilities. See *Wilder*, 496 U. S., at 506–507. The Court further noted that Congress chose a standard that leaves the States considerable autonomy in selecting the methods they will use to determine which reimbursement rates are "reasonable and adequate." *Id.*, at 506–508, 515. The result, of course, is that the "content" of the federal right to reasonable and adequate rates—the method of calculating reimbursement and the chosen rate—varies from State to State. And although federal judges are hardly expert either in selecting methods of Medicaid cost reimbursement or in determining whether particular rates are "reasonable and adequate," neither the majority nor the dissent found that the right to reasonable and adequate reimbursement was so vague and amorphous as to be "beyond the competence of the judiciary to enforce." See *id.*, at 519–520; *id.*, at 524 (REHNQUIST, C. J., dissenting). State flexibility in determining what is "reasonable," we held,

> "may affect the standard under which a court reviews whether the rates comply with the amendment, but it does not render the amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act." *Id.*, at 519–520.

The same principles apply here. There may be a "range" of "efforts" to prevent unnecessary removals or secure beneficial reunifications that are "reasonable." *Ibid.* It may also be that a court, in reviewing a State's strategies of compliance with the "reasonable efforts" clause, would owe substantial deference to the State's choice of strategies. That does not mean, however, that *no* State's efforts could *ever* be deemed "unreasonable." As in *Wilder*, the asserted right in

this case is simply not inherently "beyond the competence of the judiciary to enforce." *Ibid.*

Petitioners' argument that the "reasonable efforts" clause of the Adoption Act is so vague and amorphous as to be unenforceable assumes that in *Wright* and *Wilder* the Court was working at the outer limits of what is judicially cognizable: Any deviation from *Wright* or *Wilder*, petitioners imply, would go beyond the bounds of judicial competence. There is absolutely nothing to indicate that this is so. See *Wilder*, 496 U. S., at 520 (inquiry into reasonableness of reimbursement rates is "*well within* the competence of the Judiciary") (emphasis supplied). Federal courts, in innumerable cases, have routinely enforced reasonableness clauses in federal statutes. See, *e. g.*, *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 518, 550 (1937) (enforcing "every reasonable effort" provision of the Railway Labor Act and noting that "whether action taken or omitted is . . . reasonable [is an] everyday subjec[t] of inquiry by courts in framing and enforcing their decrees"). Petitioners have not shown that the Adoption Act's reasonableness clause is exceptional in this respect.

II

The Court does not explain why the settled three-part test for determining the enforceability of an asserted right is not applied in this case. Moreover, the reasons the Court does offer to support its conclusion—that the Adoption Act's "reasonable efforts" clause creates no enforceable right—were raised and rejected in *Wilder*.

The Court acknowledges that the Adoption Act is "mandatory in its terms." *Ante*, at 358. It adopts, however, a narrow understanding of what is "mandatory." It reasons that the language of § 671(a), which provides that "[i]n order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary," requires participating States only to submit and receive approval for a plan that contains the features listed in §§ 671(a)(1) to (16). According

to the Court, the beneficiaries of the Act enjoy at most a procedural right under § 671(a)—the right to require a participating State to prepare and file a plan—not a substantive right to require the State to live up to the commitments stated in that plan, such as the commitment to make "reasonable efforts" to prevent unnecessary removals and secure beneficial reunifications of families. Since the State of Illinois has filed a plan that the Secretary has approved, the Court reasons, the State has violated no right enforceable in federal court.

The Court's reasoning should sound familiar: The state officials in *Wilder* made exactly the same argument, and this Court rejected it. In *Wilder*, we noted that the Medicaid Act expressly conditions federal funding on state compliance with the provisions of an approved plan, and that the Secretary is required to withhold payments from noncomplying States. See 496 U. S., at 512 (citing 42 U. S. C. § 1396c).[2] In substantially identical language, the Adoption Act, too, requires States to live up to the commitments stated in their plans.[3] To be sure, the Court's reasoning is consistent with the *dissent* in *Wilder*. See 496 U. S., at 524, 527–528 (REHNQUIST, C. J., dissenting). But it flatly contradicts what the Court *held* in that case.

The Court attempts to fend off this conclusion in two ways, neither of them persuasive. First, the Court seeks to distinguish *Wilder*, asserting that our conclusion—that the Boren Amendment gave the health-care providers a substantive right to reasonable and adequate reimbursement—"relied in

---

[2] "If the Secretary . . . finds . . . that in the administration of the plan there is a failure to comply substantially with any . . . provision [required to be included in the plan,] the Secretary shall notify [the] State agency that further payments will not be made . . . ." 42 U. S. C. § 1396c.

[3] "[I]n any case in which the Secretary finds . . . there is a substantial failure to comply with the provisions of [an approved] plan, the Secretary shall notify the State that further payments will not be made . . . , or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate . . . ." 42 U. S. C. § 671(b).

part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates." *Ante*, at 359 (citing *Wilder*, 496 U. S., at 519, n. 17). By contrast, the Court continues, neither the provisions of the Adoption Act nor the implementing regulations offer any guidance as to how the term "reasonable efforts" should be interpreted.

Even assuming that it is accurate to call the statute and regulations involved in that case "detailed,"[4] the Court has misread *Wilder*. The Court there referred to the relative specificity of the statute and regulations not to demonstrate that the health-care providers enjoyed a substantive right to reasonable and adequate rates—we had already concluded that the State was under a binding obligation to adopt such rates, see *Wilder*, 496 U. S., at 514–515—but only to reinforce our conclusion that the providers' interest was not so "vague and amorphous" as to be "beyond the competence of judicial enforcement." See 496 U. S., at 519, n. 17. Under our three-part test, the Court would not have inquired whether that interest was "vague and amorphous" unless it had *already* concluded that the State was required to do more than simply file a paper plan that lists the appropriate factors.

---

[4] Petitioners suggest a sharp contrast between the implementing regulations considered in *Wilder* and the implementing regulation for the Adoption Act "reasonable efforts" provision: The former, they say, require the State to consider certain factors, but the latter merely provides "a laundry list of services the States '*may*' provide." Brief for Petitioners 34 (citing 45 CFR § 1357.15(e) (1991)). Further, petitioners emphasize the Department of Health and Human Services' remark during rulemaking that States must retain flexibility in administering the Adoption Act's "reasonable efforts" requirement. Brief for Petitioners 34–35.

Neither of these factors marks a significant difference between *Wilder* and the present case. The difference between *requiring* States to *consider* certain factors, as in *Wilder*, and *permitting* States to *provide* certain listed services, as in the present case, is hardly dramatic. As for the second asserted difference, *Wilder* itself emphasized that States must retain substantial discretion in calculating "reasonable and adequate" reimbursement rates.

Second, the Court emphasizes: "Other sections of the [Adoption] Act provide enforcement mechanisms for the reasonable efforts clause of 42 U. S. C. § 671(a)(15)." *Ante*, at 360. Such "mechanisms" include the Secretary's power to cut off or reduce funds for noncompliance with the state plan, and the requirement of a state judicial finding that "reasonable efforts" have been made before federal funds may be used to reimburse foster care payments for a child involuntarily removed.

The Court has apparently forgotten that ever since *Rosado* v. *Wyman*, 397 U. S. 397 (1970), the power of the Secretary to enforce congressional spending conditions by cutting off funds has not prevented the federal courts from enforcing those same conditions. See *id.*, at 420, 422–423. Indeed, we reasoned in *Wilder* that a similar "cutoff" provision *supports* the conclusion that the Medicaid Act creates an enforceable right, because it puts the State "on notice" that it may not simply adopt the reimbursement rates of its choosing. See 496 U. S., at 514. As for the Court's contention that § 671(a)(15) should be enforced through individual removal determinations in state juvenile court, the availability of a state judicial forum can hardly deprive a § 1983 plaintiff of a federal forum. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961). The Court's reliance on enforcement mechanisms other than § 1983, therefore, does not support its conclusion that the "reasonable efforts" clause of the Adoption Act creates no enforceable right.

The Court, without acknowledgment, has departed from our precedents in yet another way. In our prior cases, the existence of other enforcement mechanisms has been relevant not to the question whether the statute at issue creates an enforceable right, but to whether the second exception to § 1983 enforcement applies—whether, that is, "'Congress has foreclosed such enforcement of the statute in the enactment itself.'" *Wilder*, 496 U. S., at 508 (quoting *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S., at

423). In determining whether this second exception to § 1983 enforcement applies, we have required the defendant not merely to point to the existence of alternative means of enforcement, but to demonstrate "by express provision or other specific evidence from the statute itself that Congress intended to foreclose [§ 1983] enforcement." 496 U. S., at 520–521. We have said repeatedly that we will not "lightly" conclude that Congress has so intended. *Id.*, at 520 (quoting *Wright*, 479 U. S., at 423–424, in turn quoting *Smith* v. *Robinson*, 468 U. S. 992, 1012 (1984)). In only two instances, where we concluded that "the statute itself provides a comprehensive remedial scheme which leaves no room for additional private remedies under § 1983," *ante*, at 360, n. 11, have we held that Congress has intended to foreclose § 1983 enforcement. See *Smith* v. *Robinson*, 468 U. S. 992 (1984) ("carefully tailored" mixed system of enforcement beginning with local administrative review and culminating in a right to judicial review); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981) (enforcement scheme authorizing Environmental Protection Agency to bring civil suits, providing for criminal penalties, and including two citizen-suit provisions).

The Court does not find these demanding criteria satisfied here. See *ante*, at 360–361, and n. 11. Instead, it simply circumvents them altogether: The Court holds that even if the funding cutoff provision in the Adoption Act is not an "express provision" that "provides a comprehensive remedial scheme" leaving "no room for additional private remedies under § 1983," *Wilder*, 496 U. S., at 520, that provision nevertheless precludes § 1983 enforcement. In so holding, the Court has inverted the established presumption that a private remedy is available under § 1983 unless "Congress has affirmatively withdrawn the remedy." 496 U. S., at 509, n. 9 (citing *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S., at 106–107, and *Wright*, 479 U. S., at 423–424).

III

In sum, the Court has failed, without explanation, to apply the framework our precedents have consistently deemed applicable; it has sought to support its conclusion by resurrecting arguments decisively rejected less than two years ago in *Wilder;* and it has contravened 22 years of precedent by suggesting that the existence of other "enforcement mechanisms" precludes § 1983 enforcement. At least for this case, it has changed the rules of the game without offering even minimal justification, and it has failed even to acknowledge that it is doing anything more extraordinary than "interpret-[ing]" the Adoption Act "by its own terms." *Ante,* at 358, n. 8. Readers of the Court's opinion will not be misled by this hollow assurance. And, after all, we are dealing here with children. I would affirm the judgment of the Court of Appeals.[5] I dissent.

---

[5] Since I conclude that respondents have a cause of action under § 1983, I need not reach the question, decided in the affirmative by the Court of Appeals, whether petitioners may pursue a private action arising directly under the Adoption Act.

Syllabus

UNITED STATES *v.* FELIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90–1599. Argued January 14, 1992—Decided March 25, 1992

During the summer of 1987, respondent Felix manufactured methamphetamine at an Oklahoma facility. After Drug Enforcement Administration (DEA) agents shut down that facility, Felix ordered additional chemicals and equipment from a DEA informant for delivery in Missouri. Federal Government officials observed the delivery, arrested him, and charged him with the offense of attempting to manufacture an illegal drug. At his trial in Missouri, the Government, in order to establish Felix's criminal intent, introduced evidence that he had manufactured methamphetamine in Oklahoma, and he was convicted. Subsequently, he was named in, *inter alia*, six counts of an indictment filed in a Federal District Court in Oklahoma. Count 1 charged him with conspiracy to manufacture, possess, and distribute methamphetamine. Two of the overt acts supporting this charge were based on the same conduct that had been the subject of the Missouri prosecution. The other counts charged him with substantive drug offenses, and at trial the Government introduced much of the same evidence of the Missouri and Oklahoma transactions that had been introduced at the Missouri trial. Felix was convicted, but the Court of Appeals reversed, relying on language in *Grady* v. *Corbin*, 495 U. S. 508, 521, that the Double Jeopardy Clause bars a subsequent prosecution where the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." With respect to the conspiracy count, the court observed that in both trials, the Government proved that Felix had learned to make, and had manufactured, methamphetamine in Oklahoma and had sought to purchase more chemicals and equipment in Missouri. The court also noted that the direct evidence supporting the substantive offenses—that Felix had purchased chemicals and equipment during the spring of 1987 and had manufactured methamphetamine in Oklahoma—had been introduced at the Missouri trial to show intent.

Held: The Double Jeopardy Clause does not bar Felix's prosecution on either the substantive drug offenses or the conspiracy charge. Pp. 384–392.

Syllabus

(a) None of the substantive offenses for which Felix was prosecuted in Oklahoma is in any sense the same offense for which he was prosecuted in Missouri. The actual crimes charged in each case were different in both time and place, and no common conduct links them. In addition, mere overlap in proof between two prosecutions does not establish a double jeopardy violation. *Dowling* v. *United States*, 493 U. S. 342. Thus, the Court of Appeals erred to the extent that it assumed that if the Government offers in evidence in one prosecution acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution, the latter prosecution is barred. And it gave an extravagant reading to *Grady, supra*, which disclaimed any intention of adopting a "'same evidence'" test, *id.*, at 521, and n. 12. Pp. 384–387.

(b) A substantive crime and a conspiracy to commit that crime are not the "same offense" for double jeopardy purposes, see, *e. g.*, *United States* v. *Bayer*, 331 U. S. 532; *Pinkerton* v. *United States*, 328 U. S. 640, 643, even if they are based on the same underlying incidents, because the "essence" of a conspiracy offense "is in the agreement or confederation to commit a crime," *Bayer, supra*, at 542. This established doctrine predates, and was not questioned in, *Grady, supra*. In addition, while *Grady*—which involved a State's reliance on a defendant's two traffic offense convictions to sustain later-filed homicide and assault charges arising from the same accident—may be useful in cases arising from a "single course of conduct," it is much less helpful in analyzing prosecutions involving multilayered conduct, such as the conspiracy prosecution here. Thus, the Court of Appeals erred in essentially reading *Grady* as substituting for the "same offence" language of the Double Jeopardy Clause a test based on whether the two prosecutions involve the same conduct. Pp. 387–391.

926 F. 2d 1522, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined, and in Parts I and II of which BLACKMUN and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 392.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Mueller*, and *James A. Feldman.*

Scott M. Anderson argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

During the summer of 1987, respondent Frank Dennis Felix operated a facility in Beggs, Oklahoma, at which he manufactured methamphetamine in violation of applicable federal statutes. In July, this facility was raided and shut down by Drug Enforcement Administration (DEA) agents. Felix thereupon ordered precursor chemicals and equipment for the manufacture of methamphetamine to be delivered to him at Joplin, Missouri. DEA agents observed the transfer of these items and arrested Felix shortly afterwards. He was charged and tried in the Western District of Missouri for the offense of attempting to manufacture the illegal drug between August 26 and August 31, 1987. This charge was based upon the delivery of the materials to him at Joplin. He was tried, found guilty, and his conviction and sentence were affirmed by the Court of Appeals for the Eighth Circuit.

In February 1989, Felix was charged in the Eastern District of Oklahoma with both conspiracy and substantive counts in connection with the operation of the facility at Beggs. He was tried and convicted, but the Court of Appeals for the Tenth Circuit reversed most of the counts on which he had been found guilty because of its view that trial on these counts constituted double jeopardy in violation of the Fifth Amendment. We hold that prosecution of a defendant for conspiracy, where certain of the overt acts relied

---

**Edward T. M. Garland* and *Donald F. Samuel* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

upon by the Government are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause.

I

At Felix's trial for attempting to manufacture methamphetamine in Missouri, the Government showed that on August 26, 1987, Felix asked to purchase chemicals and equipment needed for the manufacture of methamphetamine from George Dwinnells, a DEA informant. Felix made a down payment of $7,500 toward the purchase, and in later telephone conversations instructed Dwinnells to deliver the items to a Joplin, Missouri, hotel on August 31, 1987. Dwinnells met Felix at the hotel on that date with the merchandise. After Felix inspected the items and hitched his car to the trailer in which the items had been transported, Government officials arrested him.

Felix's defense in the Missouri case was that "he never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation." *United States* v. *Felix*, 867 F. 2d 1068, 1074 (CA8 1989). In order to establish Felix's criminal intent with respect to the items delivered in Missouri, the Government introduced evidence that Felix had manufactured methamphetamine in Oklahoma earlier in 1987. See Fed. Rule Evid. 404(b) (Evidence of prior acts is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). The evidence showed that during the spring of 1987, Felix had purchased precursor materials from Dwinnells and had furnished those items to Paul Roach in exchange for lessons on how to manufacture methamphetamine. Roach, who testified for the Government at Felix's Missouri trial, stated that he and Felix had produced methamphetamine in a trailer near Beggs, Oklahoma. Government agents had seized the trailer, which was indeed being used as a methamphetamine lab, on July 13, 1987.

The agents did not arrest Felix at that time, however; he later told Dwinnells that he had avoided arrest by hiding in the nearby woods. In accordance with Rule 404(b), the District Court instructed the jury that the evidence of the Oklahoma transactions was admissible only to show Felix's state of mind with respect to the chemicals and equipment he attempted to purchase in Missouri. The jury convicted Felix, and the Eighth Circuit affirmed. 867 F. 2d, at 1070–1076.

The Government subsequently named Felix in 8 counts of an 11-count indictment filed in the United States District Court for the Eastern District of Oklahoma. Count 1 charged that Felix and five others conspired, between May 1, 1987, and August 31, 1987, to manufacture, possess, and distribute methamphetamine. Felix was named in nine of the overt acts supporting the conspiracy charge; two of those nine overt acts were based on conduct that had been the subject of the earlier Missouri prosecution. Overt act 17 charged that "[o]n August 26, 1987, Frank Dennis Felix, while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." Overt act 18 charged that "[o]n August 31, 1987, Frank Dennis Felix, while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." Along with the conspiracy charge, Felix was named in seven substantive counts. Counts 2 through 5 alleged that on or about July 13, 1987, in the Eastern District of Oklahoma, Felix had manufactured methamphetamine, possessed methamphetamine with intent to distribute it, possessed methamphetamine oil with intent to manufacture methamphetamine, and manufactured phenylacetone, a methamphetamine precursor. Count 6 charged that, between June 1, 1987, and July 13, 1987, in the Eastern District of Oklahoma, Felix and a codefendant had maintained a methamphetamine manufacturing lab. Counts 9 and 10 charged that, on or about June 21, 1987, and July 13,

1987, Felix had traveled from Texas to the Eastern District of Oklahoma with the intent to promote the manufacture of methamphetamine and had thereafter attempted to promote that activity. At trial, the Government introduced much of the same evidence of the Missouri and Oklahoma transactions that had been introduced in the Missouri trial. The jury convicted Felix of all the crimes with which he was charged.

A divided panel of the Court of Appeals for the Tenth Circuit reversed Felix's convictions on counts 1 through 6 of the Oklahoma indictment. The court began by quoting our statement in *Grady* v. *Corbin*, 495 U. S. 508 (1990), that the Double Jeopardy Clause bars a subsequent prosecution where the government, "'to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.'" 926 F. 2d 1522, 1527 (1991) (quoting *Grady* v. *Corbin*, *supra*, at 521). With respect to count 1, the conspiracy charge, the court observed that in both the Missouri and Oklahoma trials, the Government proved that Felix had learned to make methamphetamine in Oklahoma, had thereafter manufactured the drug at the lab near Beggs, Oklahoma, and had sought to purchase more chemicals and equipment in Missouri after the raid on the Oklahoma lab. Based on the significant duplication of conduct proved in each trial, the court concluded that the Oklahoma conspiracy count was barred under the Double Jeopardy Clause because it charged "the same conduct for which he was previously convicted in Missouri." 926 F. 2d, at 1530. With respect to the substantive offenses charged in counts 2 through 6, the court noted that the direct evidence supporting these charges—the fact that Felix had purchased chemicals and equipment during the spring of 1987, and had subsequently manufactured methamphetamine at the Beggs, Oklahoma, trailer—had been introduced at the previous Missouri trial to show intent. The court concluded that this

duplication "subjected Felix to a successive trial for the same conduct," and therefore reversed Felix's convictions on counts 2 through 6. *Id.*, at 1530–1531.[1]

We granted certiorari, 502 U. S. 806 (1991), to consider whether the Double Jeopardy Clause bars the prosecution of Felix for these crimes.[2] We hold that it does not, and so reverse.

II

We first consider whether the Double Jeopardy Clause bars Felix's prosecution on the substantive drug offenses contained in counts 2 through 6 of the Oklahoma indictment. The Court of Appeals held that the Government was fore-

---

[1]The Court of Appeals affirmed Felix's convictions on counts 9 and 10 of the indictment, which charged unlawful interstate travel. The court concluded that the conduct alleged in those counts was not sufficiently related to the conduct proved in the earlier Missouri trial to require their dismissal under the Double Jeopardy Clause. 926 F. 2d, at 1531.

[2]The Courts of Appeals have differed in applying *Grady* to successive prosecutions for offenses arising out of a continuing course of conduct, such as the conspiracy prosecution in this case. In *United States* v. *Calderone*, 917 F. 2d 717 (1990), the Second Circuit held that the Double Jeopardy Clause barred a conspiracy prosecution where the defendant had been previously prosecuted for a "broader" conspiracy that entirely encompassed the actions alleged in the second, "narrower" conspiracy. The court based its decision on our language in *Grady*, concluding that the "conduct" at issue in a conspiracy prosecution is not the agreement itself, but the conduct from which the Government asks the jury to infer an agreement. See *id.*, at 721–722. The Second Circuit later followed that reasoning in holding that a conspiracy prosecution is barred if certain overt acts supporting the conspiracy charge involve substantive offenses for which the defendant has been previously prosecuted. *United States* v. *Gambino*, 920 F. 2d 1108 (1990). The Tenth Circuit agreed with that position in upholding Felix's double jeopardy claim below. 926 F. 2d 1522 (1991).

On the other hand, two Courts of Appeals have concluded that the Government is not barred from bringing a successive conspiracy prosecution, even where it seeks to base the conspiracy offense on previously prosecuted conduct. *United States* v. *Rivera-Feliciano*, 930 F. 2d 951 (CA1 1991); *United States* v. *Clark*, 928 F. 2d 639 (CA4 1991).

closed from prosecuting these charges, because it had presented evidence of the Oklahoma drug operation at the prior trial in order to help demonstrate Felix's criminal intent with respect to the Missouri transaction.

At its root, the Double Jeopardy Clause forbids the duplicative prosecution of a defendant for the "same offence." U. S. Const., Amdt. 5; see *Blockburger* v. *United States*, 284 U. S. 299 (1932). An examination of the indictments below shows that Felix was charged in the Missouri case only with attempting to manufacture methamphetamine in Missouri, in late August 1987. App. to Pet. for Cert. 62a–63a. In the five substantive drug counts of the Oklahoma indictment that are at issue here, Felix was charged with various drug offenses that took place in Oklahoma, in June and July 1987. *Id.*, at 55a–57a. The crimes charged in the Oklahoma indictment were related to the operation of the methamphetamine lab near Beggs, Oklahoma, in the summer of 1987, while the crime charged in the Missouri indictment dealt solely with Felix's attempt to purchase chemicals and equipment from Dwinnells in order to continue methamphetamine operations after the Beggs lab was raided. The actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses. In short, none of the offenses for which Felix was prosecuted in the Oklahoma indictment is in any sense the "same offence" as the offence for which he was prosecuted in Missouri.

The Court of Appeals appears to have acknowledged as much, as it concentrated not on the actual crimes prosecuted in the separate trials, but instead on the type of evidence presented by the Government during the two trials. The court found it decisive that the Government had introduced evidence of Felix's involvement in the Oklahoma lab to help show criminal intent for purposes of the Missouri trial. But it is clear that, no matter how much evidence of the Oklahoma transactions was introduced by the Government to

help show Felix's state of mind, he was not *prosecuted* in the Missouri trial for any offense other than the Missouri attempt offense with which he was charged. Thus, the Court of Appeals holding must rest on an assumption that if the Government offers in evidence in one prosecution acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution, the latter prosecution is barred under the Double Jeopardy Clause.

But such an assumption is not supportable; our precedents hold that a mere overlap in proof between two prosecutions does not establish a double jeopardy violation. The Court of Appeals relied on the above-quoted language from our opinion in *Grady* v. *Corbin*, 495 U. S., at 521, in reaching its result. But we think that this is an extravagant reading of *Grady*, which disclaimed any intention of adopting a "'same evidence'" test. *Id.*, at 521, and n. 12; accord, *Gavieres* v. *United States*, 220 U. S. 338 (1911). Our decision two Terms ago in *Dowling* v. *United States*, 493 U. S. 342 (1990), drives home this point.

In that case, Dowling was charged with bank robbery. To help prove his identity at trial, the Government introduced evidence under Federal Rule of Evidence 404(b) concerning the unrelated robbery of a woman named Vena Henry. She testified that she had been robbed by a man wearing a knitted mask similar to the one used by the bank robber, and that she had been able to identify the intruder as Dowling after unmasking him during a struggle. We upheld the introduction of Henry's testimony at the bank robbery trial, despite the fact that Dowling had previously been acquitted of the Henry charges. The primary ruling of that case was our conclusion that the collateral-estoppel component of the Double Jeopardy Clause offered Dowling no protection despite his earlier acquittal, because the relevance of evidence offered under Rule 404(b) was governed by a lower standard of proof than that required for a conviction. See 493 U. S., at 348–349 (citing *Huddleston* v. *United States*, 485 U. S. 681,

689 (1988)). But it is clear that we would not have had to reach the collateral-estoppel question if the mere introduction, pursuant to Rule 404(b), of evidence concerning the Henry robbery constituted a second prosecution of that crime for purposes of the Double Jeopardy Clause. Underlying our approval of the Henry evidence in *Dowling* is an endorsement of the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.[3]

That principle is clearly applicable here. At the Missouri trial, the Government did not in any way *prosecute* Felix for the Oklahoma methamphetamine transactions; it simply introduced those transactions as prior acts evidence under Rule 404(b). The Government was therefore free to prosecute Felix in the trial below for the substantive drug crimes detailed in counts 2 through 6.

III

We next examine whether the Court of Appeals erred in holding that the Double Jeopardy Clause bars the prosecution of Felix for the conspiracy charge contained in count 1 of the indictment. Here, too, that court—with considerable

---

[3] There is an obvious distinction between *Dowling* and this case, but one that makes no difference for purposes of our analysis here. In *Dowling*, the defendant was first prosecuted for the Henry robbery, and evidence concerning that robbery was subsequently admitted for Rule 404(b) purposes at a second prosecution. In this case, evidence of the Oklahoma drug transactions was first admitted for Rule 404(b) purposes at the Missouri trial, and Felix was subsequently prosecuted for the Oklahoma drug transactions. The first situation might raise collateral-estoppel concerns as a result of an initial acquittal, concerns we confronted in *Dowling*, while the latter situation would not. But both situations would be equally affected by a rule that the admission of evidence concerning a crime under Rule 404(b) constitutes prosecution for that crime; under such a rule, the Double Jeopardy Clause would have barred the subsequent admission of the Henry evidence in *Dowling*, and it would bar the subsequent prosecution of the Oklahoma drug crimes in this case. We decline to adopt such a rule.

justification—relied upon language from our *Grady* opinion to support its conclusion. There is no doubt that the conspiracy charge presents a more difficult question than the substantive drug offenses dealt with in Part II above, because with respect to it there exists more than a mere overlap in evidence. Of the nine overt acts supporting the conspiracy charge against Felix, two were based on the conduct for which he had been previously prosecuted in Missouri. But we hold that because of long established precedent in this area, which was not questioned in *Grady*, Felix's claim of double jeopardy fails.

Felix contends, and the Court of Appeals agreed, that language from *Grady* bars the conspiracy prosecution. There we said that the Double Jeopardy Clause bars a prosecution where the Government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U. S., at 521. Taken out of context, and read literally, this language supports the defense of double jeopardy. But we decline to read the language so expansively, because of the context in which *Grady* arose and because of difficulties which have already arisen in its interpretation.

Grady involved a defendant who had driven his car across the median line of a two-way highway and struck an oncoming car, killing one of the occupants. The State charged the defendant with driving while intoxicated and with failing to keep right of the median, and the defendant pleaded guilty to those two traffic violations. Two months later, the State prosecuted the defendant on homicide and assault charges arising from the accident, and the defendant argued that this was a violation of his rights under the Double Jeopardy Clause. In our decision, we recognized our previous holdings that the traditional *Blockburger* test governing double jeopardy claims bars a subsequent prosecution if one of the two offenses is a lesser included offense of the other. See

Grady v. *Corbin*, *supra*, at 519 (citing *Brown* v. *Ohio*, 432 U. S. 161 (1977); *Harris* v. *Oklahoma*, 433 U. S. 682 (1977)). Although the traffic offenses involved in *Grady* were not technically lesser included offenses of the homicide and assault charges, we analogized the case to the situation we had previously confronted in *Illinois* v. *Vitale*, 447 U. S. 410 (1980). There, the State sought to prosecute the defendant for involuntary manslaughter after a car accident. We stated, in dicta, that if the State found it necessary to rely on a previous failure to reduce speed conviction to sustain the manslaughter charge, the Double Jeopardy Clause might protect the defendant. See *id.*, at 420. Despite the fact that neither offense was technically a lesser included offense of the other, we observed that, in such a circumstance, the failure to slow offense might be viewed as a "species of lesser-included offense." *Ibid.* In *Grady*, the State sought to rely on the two previous traffic offense convictions to sustain the homicide and assault charges, presenting the situation about which we had speculated in *Vitale*. In concluding that the Double Jeopardy Clause barred the subsequent homicide and assault prosecutions, we simply adopted the suggestion we had previously made in dicta in *Vitale*. *Grady* v. *Corbin*, *supra*, at 521.

But long antedating any of these cases, and not questioned in any of them, is the rule that a substantive crime and a conspiracy to commit that crime are not the "same offence" for double jeopardy purposes.

For example, in *United States* v. *Bayer*, 331 U. S. 532 (1947), a military officer had been convicted in court-martial proceedings of discrediting the military service by accepting payments in return for transferring soldiers to noncombat units. We held that his subsequent prosecution in federal court on charges of conspiring to defraud the Government of his faithful services was not barred by the Double Jeopardy Clause, despite the fact that it was based on the same underlying incidents, because the "essence" of a conspiracy offense

"is in the agreement or confederation to commit a crime." *Id.*, at 542. In language applicable here, we pointedly stated that "the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself." *Ibid.*; see also *Pinkerton* v. *United States*, 328 U. S. 640, 643 (1946) ("[T]he commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses . . . [a]nd the plea of double jeopardy is no defense to a conviction for both offenses"). We have continued to recognize this principle over the years. See *Iannelli* v. *United States*, 420 U. S. 770, 777–779 (1975); *Garrett* v. *United States*, 471 U. S. 773, 778 (1985) ("[C]onspiracy is a distinct offense from the completed object of the conspiracy"); cf. *id.*, at 793 ("[I]t does not violate the Double Jeopardy Clause . . . to prosecute [a continuing criminal enterprise] offense after a prior conviction for one of the predicate offenses").

In a related context, we recently cautioned against "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in *Brown* [v. *Ohio*] to the multilayered conduct, both as to time and to place, involved in [continuing criminal enterprise (CCE) prosecutions]." *Id.*, at 789. The great majority of conspiracy prosecutions involve similar allegations of multilayered conduct as to time and place; the conspiracy charge against Felix is a perfect example. Reliance on the lesser included offense analysis, however useful in the context of a "single course of conduct," is therefore much less helpful in analyzing subsequent conspiracy prosecutions that are supported by previously prosecuted overt acts, just as it falls short in examining CCE offenses that are based on previously prosecuted predicate acts. *Id.*, at 788–789.

Faced with the necessity of reconciling this longstanding authority with our language in *Grady*, we choose to adhere to the *Bayer-Pinkerton* line of cases dealing with the distinction between conspiracy to commit an offense and the

offense itself. These are separate offenses for double jeopardy purposes. The majority in the Court of Appeals below essentially read *Grady* as substituting for the "same offence" language of the Double Jeopardy Clause a test based on whether the two prosecutions involve the "same conduct." The dissenting judge in the Court of Appeals thought that this was an oversimplification, pointing to the fact that the word "conduct" in the previously quoted sentence from *Grady* is modified by the phrase "'that constitutes an offense for which the defendant has already been prosecuted.'" 926 F. 2d, at 1532 (Anderson, J., dissenting) (quoting *Grady* v. *Corbin*, 495 U. S., at 521). The Court of Appeals for the Second Circuit, in *United States* v. *Calderone*, 917 F. 2d 717 (1990), upheld a claim of double jeopardy by a divided vote, with each judge on the panel writing an opinion interpreting the crucial language from *Grady* differently. That court decided that the "conduct" at issue in a conspiracy prosecution is not the agreement itself, but the conduct from which the Government asks the jury to infer that there was an agreement. 917 F. 2d, at 721. Judge Newman filed a concurring opinion, concluding that *Grady* bars a subsequent prosecution only when previously prosecuted conduct will be used to establish the *entirety* of an element of the second crime. See 917 F. 2d, at 723–725 (Newman, J., concurring). Other Courts of Appeals, as described in more detail in n. 2, *supra*, have rejected double jeopardy claims in similar situations. It appears that while *Grady* eschewed a "same evidence" test and *Garrett* rejected a "'single transaction'" test, *Garrett* v. *United States*, *supra*, at 790, the line between those tests and the "same conduct" language of *Grady* is not easy to discern.

We think it best not to enmesh in such subtleties the established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself. Thus, in this case, the conspiracy charge against Felix was an offense distinct from any crime for which he had been previously prosecuted, and

the Double Jeopardy Clause did not bar his prosecution on that charge.

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

While I join Parts I and II of the Court's opinion, I do not join Part III because I do not think there is "considerable justification," *ante*, at 387–388, for the Court of Appeals' conclusion that the Double Jeopardy Clause, as interpreted in *Grady* v. *Corbin*, 495 U. S. 508 (1990), bars prosecution of Felix for the conspiracy charge contained in count 1 of the indictment. In *Grady*, we held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U. S., at 510. But as the dissenting opinion of the Court of Appeals explained, "the overt acts at issue here did not meaningfully 'establish' an essential element of the conspiracy" because there is no overt act requirement in the federal drug conspiracy statute and the overt acts did not establish an agreement between Felix and his co-conspirators. 926 F. 2d 1522, 1536 (CA10 1991) (Anderson, J., dissenting). I would thus reverse for the reasons explained in Parts I and II of the Court's opinion, *ante*, at 381–387, and Part III–B of the dissenting opinion of the Court of Appeals, 926 F. 2d, at 1536–1539.

Syllabus

BARNHILL *v.* JOHNSON, TRUSTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 91–159. Argued January 14, 1992—Decided March 25, 1992

The debtor's check in payment of a bona fide debt was delivered to petitioner Barnhill in New Mexico on November 18 and honored by the drawee bank on November 20, the 90th day before the debtor filed a Chapter 11 bankruptcy petition. Respondent Johnson, the trustee of the debtor's estate, filed an adversary action against Barnhill, claiming that the payment was recoverable under 11 U. S. C. § 547(b) as a transfer of the debtor's property made on or within 90 days of the bankruptcy filing. Johnson asserted that the transfer occurred on the date that the bank honored the check, but Barnhill claimed that it occurred on the date that he received the check. The Bankruptcy Court agreed with Barnhill and denied recovery, and the District Court affirmed. The Court of Appeals reversed, holding that a date of honor rule should govern § 547(b) actions.

Held: For the purposes of § 547(b), a transfer made by check is deemed to occur on the date the check is honored. Pp. 396–402.

(a) "What constitutes a transfer and when it is complete" is a matter of federal law. *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365, 369–370. The Bankruptcy Code defines "transfer" as "every mode, . . . absolute or conditional, . . . of disposing of . . . property or . . . an interest in property." 11 U. S. C. § 101(54). In the absence of any controlling federal law, "property" and "interest[s] in property" are creatures of state law. *McKenzie, supra,* at 370. Under the Uniform Commercial Code, which has been adopted by New Mexico, a check is simply an order to the drawee bank to pay the sum stated on demand. If the check is honored, the debtor's obligation is discharged, but if it is not honored, a cause of action against the debtor accrues to the check recipient "upon demand following dishonor." Pp. 396–399.

(b) An unconditional transfer of the debtor's interest in property did not occur before November 20, since receipt of the check gave Barnhill no right in the funds the bank held on the debtor's account. No transfer of any part of the debtor's claim against the bank occurred until the bank honored the check, at which time the bank had the right to "charge" the debtor's account and Barnhill's claim against the debtor ceased. Honoring the check left the debtor in the position that it would have occupied had it withdrawn cash from its account and handed it

over to Barnhill. Thus, it was not until the debtor directed the bank to honor the check *and* the bank did so, that the debtor implemented a "mode . . . of disposing . . . of property or . . . an interest in property" under § 101(54) and a "transfer" took place. Pp. 399–400.

(c) Barnhill's argument that delivery of a check should be viewed as a "conditional" transfer is rejected. Any chose in action against the debtor that he gained when he received the check cannot be fairly characterized as a conditional right to "property or . . . an interest in property," since, until the moment of honor, the debtor remained in full control over the account's disposition and the account remained subject to a variety of actions by third parties. In addition, the rule of honor is consistent with § 547(e)(2)(A), which provides that a transfer occurs at the time it "takes effect between the transferor and the transferee," particularly since the debtor here retained the ability to stop payment on the check until the very last. Barnhill's appeal to legislative history is also unavailing. Pp. 400–402.

931 F. 2d 689, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 403.

William J. Arland III argued the cause for petitioner. With him on the briefs was *Emily A. Franke.*

Nancy S. Cusack argued the cause for respondent. With her on the brief were *William P. Johnson* and *Andrew J. Cloutier.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Under the Bankruptcy Code's preference avoidance section, 11 U. S. C. § 547, the trustee is permitted to recover, with certain exceptions, transfers of property made by the debtor within 90 days before the date the bankruptcy petition was filed. We granted certiorari to decide whether, in determining if a transfer occurred within the 90-day preference period, a transfer made by check should be deemed to occur on the date the check is presented to the recipient or

on the date the drawee bank honors it. We hold that the latter date is determinative.

The relevant facts in this case are not in dispute. The debtor[1] made payment for a bona fide debt to petitioner Barnhill. The check was delivered to petitioner on November 18. The check was dated November 19, and the check was honored by the drawee bank on November 20. The debtor later filed a Chapter 11 bankruptcy petition. It is agreed by the parties that the 90th day before the bankruptcy filing was November 20.

Respondent Johnson was appointed trustee for the bankruptcy estate. He filed an adversary proceeding against petitioner, claiming that the check payment was recoverable by the estate pursuant to 11 U. S. C. § 547(b). That section generally permits the trustee to recover for benefit of the bankruptcy estate transfers of the debtor's property made within 90 days of the bankruptcy filing. Respondent asserted that the transfer occurred on November 20, the date the check was honored by the drawee bank, and therefore was within the 90-day period. Petitioner defended by claiming that the transfer occurred on November 18, the date he received the check (the so-called "date of delivery" rule), and that it therefore fell outside the 90-day period established by § 547(b)(4)(A).

The Bankruptcy Court concluded that a date of delivery rule should govern and therefore denied the trustee recovery. The trustee appealed, and the District Court affirmed. The trustee then appealed to the Court of Appeals for the Tenth Circuit.

---

[1] The debtor in this case is actually a collection of debtors whose simultaneous and related bankruptcy filings have been consolidated in a single proceeding: Alan J. and Mary Frances Antweil, husband and wife, Morris Antweil (deceased), and Hobbs Pipe & Supply, a general partnership. Nothing in our decision turns on this fact, and we therefore refer to them collectively as "debtor."

The Court of Appeals for the Tenth Circuit reversed, concluding that a date of honor rule should govern actions under § 547(b). *In re Antweil*, 931 F. 2d 689 (1991). It distinguished a prior decision, *In re White River Corp.*, 799 F. 2d 631 (1986), in which it held that, for purposes of § 547(c), a date of delivery rule should govern when a transfer occurs.[2] The Tenth Circuit concluded that §§ 547(b) and 547(c) have different purposes and functions, justifying different rules for each. It further concluded that a date of honor rule was appropriate because such a rule was consistent with provisions of the Uniform Commercial Code (U. C. C.), was capable of easier proof, and was less subject to manipulation. We granted certiorari to resolve a Circuit split.[3] 502 U. S. 807 (1991).

In relevant part, § 547(b) provides:

> "(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
>
> . . . . .
>
> "(4) made—
>
> "(A) on or within 90 days before the date of the filing of the petition . . . ."

---

[2] Section 547(c) establishes certain transfers that are not recoverable as preferences, even if they fall within the 90-day preference period. See *infra*, at 402.

[3] Those selecting a date of honor rule include *Nicholson* v. *First Investment Co.*, 705 F. 2d 410 (CA11 1983) (Bankruptcy Act), and *In re New York City Shoes, Inc.*, 880 F. 2d 679 (CA3 1989) (dicta). Those selecting date of delivery include *Global Distribution Network, Inc.* v. *Star Expansion Co.*, 949 F. 2d 910 (CA7 1991); *In re Virginia Information Systems Corp.*, 932 F. 2d 338 (CA4 1991); *In re Belknap, Inc.*, 909 F. 2d 879 (CA6 1990); and *In re Kenitra, Inc.*, 797 F. 2d 790 (CA9 1986), cert. denied *sub nom. Morrow, Inc.* v. *Agri-Beef Co.*, 479 U. S. 1054 (1987).

Title 11 U. S. C. § 101(54) (1988 ed., Supp. II)[4] defines "transfer" to mean

> "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption."

Section 547(e) provides further guidance on the meaning and dating of a transfer. For purposes of § 547, it provides

> "[(e)(1)](B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.
>
> "[(e)](2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—
>
> "(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;
>
> "(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days . . . ."

Our task, then, is to determine whether, under the definition of transfer provided by § 101(54), and supplemented by § 547(e), the transfer that the trustee seeks to avoid can be said to have occurred before November 20.

"What constitutes a transfer and when it is complete" is a matter of federal law. *McKenzie* v. *Irving Trust Co.*, 323

[4] The definition of transfer was codified in 1986 at 11 U. S. C. § 101(50). In 1990, Congress added eight new definitions to § 101 in two separate Acts, Public Laws 101–311 and 101–647. The addition of the new definitions apparently has resulted in confusion in codifying those definitions, with the result that there are now in the United States Code, Chapter 11, two sections 101(54), one defining "stockbroker" and the second defining "transfer." We will refer to "transfer" as being codified at § 101(54).

U. S. 365, 369–370 (1945). This is unsurprising since, as noted above, the statute itself provides a definition of "transfer." But that definition in turn includes references to parting with "property" and "interest[s] in property." In the absence of any controlling federal law, "property" and "interests in property" are creatures of state law. *Id.*, at 370; *Butner* v. *United States*, 440 U. S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law"). Thus it is helpful to sketch briefly the rights and duties enjoyed under state law by each party to a check transaction.[5]

A person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance. Under the U. C. C., a check is simply an order to the drawee bank to pay the sum stated, signed by the maker and payable on demand. U. C. C. §§3–104(1), (2)(b), 2 U. L. A. 224 (1991). Receipt of a check does not, however, give the recipient a right against the bank. The recipient may present the check, but, if the drawee bank refuses to honor it, the recipient has no recourse against the drawee. §3–409(1), 2A U. L. A. 189 (1991).[6]

That is not to say, however, that the recipient of a check is without any rights. Receipt of a check for an underlying obligation suspends the obligation "pro tanto until the instrument['s] . . . presentment[;] . . . discharge of the underlying obligor on the instrument also discharges him on the obligation." §3–802(1)(b), 2A U. L. A. 514 (1991). But should

---

[5] We discuss these issues under the rubric of the U. C. C. and, in particular, U. C. C. Article 3. New Mexico, the State in which the instant transaction occurred, has adopted the U. C. C., see N. M. Stat. Ann. §55–3–101 *et seq.* (1978 and Supp. 1991), as have all other 49 States, the District of Columbia, Guam, and the Virgin Islands. We are aware of no material differences between the version adopted by each of these other jurisdictions and the one we consider today, that of New Mexico.

[6] "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it."

the drawee bank refuse to honor a check, a cause of action against the drawer of the check accrues to the recipient of a check "upon demand following dishonor of the instrument." § 3–122(3), 2 U. L. A. 407 (1991); see also § 3–413(2), 2A U. L. A. 208 (1991). And the recipient of a dishonored check, received in payment on an underlying obligation, may maintain an action on either the check or the obligation. § 3–802(1)(b), 2A U. L. A. 514 (1991).

With this background we turn to the issue at hand. Petitioner argues that the Court of Appeals erred in ignoring the interest that passed from the debtor to the petitioner when the check was delivered on a date outside the 90-day preference period. We disagree. We begin by noting that there can be no assertion that an unconditional transfer of the debtor's interest in property had occurred before November 20. This is because, as just noted above, receipt of a check gives the recipient no right in the funds held by the bank on the drawer's account. Myriad events can intervene between delivery and presentment of the check that would result in the check being dishonored. The drawer could choose to close the account. A third party could obtain a lien against the account by garnishment or other proceedings. The bank might mistakenly refuse to honor the check.[7]

The import of the preceding discussion for the instant case is that no transfer of any part of the debtor's claim against the bank occurred until the bank honored the check on November 20. The drawee bank honored the check by paying it. U. C. C. § 1–201(21), 1 U. L. A. 65 (1989) (defining honor); § 4–215(a), 2B U. L. A. 45 (1991). At that time, the bank had a right to "charge" the debtor's account, § 4–401, 2B U. L. A. 307 (1991)—*i. e.*, the debtor's claim against the bank was reduced by the amount of the check—and petitioner no longer

[7] Admittedly, such behavior might create a cause of action for the debtor-drawer, see U. C. C. § 4–402, 2B U. L. A. 59 (1991), but the recipient would not have any claim against the bank.

had a claim against the debtor. Honoring the check, in short, left the debtor in the position that it would have occupied if it had withdrawn cash from its account and handed it over to petitioner. We thus believe that when the debtor has directed the drawee bank to honor the check *and* the bank has done so, the debtor has implemented a "mode, direct or *indirect* . . . of disposing . . . of property or . . . an interest in property." 11 U. S. C. § 101(54) (1988 ed., Supp. II) (emphasis added). For the purposes of payment by ordinary check, therefore, a "transfer" as defined by § 101(54) occurs on the date of honor, and not before. And since it is undisputed that honor occurred within the 90-day preference period, the trustee presumptively may avoid this transfer.

In the face of this argument, petitioner retreats to the definition of "transfer" contained in § 101(54). Petitioner urges that rather than viewing the transaction as involving two distinct actions—delivery of the check, with no interest in property thereby being transferred, and honoring of the check, with an interest being transferred—that we instead should view delivery of the check as a "conditional" transfer. We acknowledge that § 101(54) adopts an expansive definition of transfer, one that includes "every mode . . . absolute or conditional . . . of disposing of or parting with property or with an interest in property." There is thus some force in petitioner's claim that he did, in fact, gain something when he received the check. But at most, what petitioner gained was a chose in action against the debtor.[8] Such a right, however, cannot fairly be characterized as a conditional right to

[8] Petitioner asserts that upon the date of delivery, he held a cause of action against the debtor. Brief for Petitioner 18. We think that petitioner may overstate matters a bit; it appears under the U. C. C. that receipt of the check provides a *contingent* cause of action, the contingency being a subsequent dishonoring of the check and a demand to the drawer for payment. See U. C. C. § 3–122(3), 2 U. L. A. 407 (1991), and Official Comment ¶ 1. It is unnecessary to resolve this question, however, for even on petitioner's more expansive assertion his claim under the Bankruptcy Code fails.

"property . . . or an interest in property," § 101(54), where the property in this case is the account maintained with the drawee bank. For as noted above, until the moment of honor the debtor retains full control over disposition of the account and the account remains subject to a variety of actions by third parties. To treat petitioner's nebulous right to bring suit as a "conditional transfer" of the property would accomplish a near-limitless expansion of the term "conditional." In the absence of any right against the bank or the account, we think the fairer description is that petitioner had received no interest in debtor's property, not that his interest was "conditional."

Finally, we note that our conclusion that no transfer of property occurs until the time of honor is consistent with § 547(e)(2)(A). That section provides that a transfer occurs at the time the transfer "takes effect between the transferor and the transferee . . . ." For the reasons given above, and in particular because the debtor in this case retained the ability to stop payment on the check until the very last, we do not think that the transfer of funds in this case can be said to have "taken effect between the debtor and petitioner" until the moment of honor.

Recognizing, perhaps, the difficulties in his position, petitioner places his heaviest reliance not on the statutory language but on accompanying legislative history. Specifically, he points to identical statements from Representative Edwards and Senator DeConcini that "payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of sections 547(c)(1) and (2)." 124 Cong. Rec. 32400 (1978); *id.*, at 34000. We think this appeal to legislative history unavailing.

To begin, we note that appeals to statutory history are well taken only to resolve "statutory ambiguity." *Toibb* v. *Radloff*, 501 U. S. 157, 162 (1991). We do not think this is such a case. But even if it were, the statements on which

petitioner relies, by their own terms, apply only to § 547(c), not to § 547(b). Section 547(c), in turn, establishes various exceptions to § 547(b)'s general rule permitting recovery of preferential transfers. Subsection (c)(1) provides an exception for transfers that are part of a contemporaneous exchange of new value between a debtor and creditor; subsection (c)(2) provides an exception for transfers made from debtor to creditor in the ordinary course of business. These sections are designed to encourage creditors to continue to deal with troubled debtors on normal business terms by obviating any worry that a subsequent bankruptcy filing might require the creditor to disgorge as a preference an earlier received payment. But given this specialized purpose, we see no basis for concluding that the legislative history, particularly legislative history explicitly confined by its own terms to § 547(c), should cause us to adopt a "date of delivery" rule for purposes of § 547(b).[9]

---

[9] Those Courts of Appeals to have considered the issue are unanimous in concluding that a "date of delivery" rule should apply to check payments for purposes of § 547(c). *Braniff Airways, Inc.* v. *Midwest Corp.*, 873 F. 2d 805 (CA5 1989); *In re Continental Commodities, Inc.*, 841 F. 2d 527 (CA4 1988); *In re Wolf & Vine*, 825 F. 2d 197 (CA9 1987); *In re Kenitra, Inc.*, 797 F. 2d 790 (CA9 1986); *In re White River Corp.*, 799 F. 2d 631 (CA10 1986); and *O'Neill* v. *Nestle Libbys P. R., Inc.*, 729 F. 2d 35 (CA1 1984). A few Bankruptcy Courts and District Courts have disagreed. See, *e. g.*, *In re Hartwig Poultry, Inc.*, 56 B. R. 332 (Bkrtcy. Ct. ND Ohio 1985). We, of course, express no views on that issue, which is not properly before us. We do note, however, that § 547(c)(2) has undergone significant change since the time of Representative Edwards' and Senator DeConcini's comments. Section 547(c)(2) previously had a requirement that, in order for a payment by the debtor to qualify as a payment in the ordinary course of business, the payment had to have been made within 45 days of when the underlying debt was first incurred. That requirement has since been eliminated. See *Union Bank* v. *Wolas*, 502 U. S. 151, 156–157 (1991). This in turn may mean that, in the context of a check payment, there is now less need to precisely date the time when a check transfer occurs for purposes of § 547(c)(2). That is, rather than inquiring whether a transfer occurred on the 45th day or the 46th, courts now need only focus on whether the transfer was made in the ordinary course of business. *Id.*,

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In my opinion, a "transfer" of property occurs on the date the check is delivered to the transferee, provided that the check is honored within 10 days. This conclusion is consistent with the traditional commercial practice of treating the date of delivery as the date of payment when a payment is made by a check that is subsequently honored by the drawee bank.[1] It is also consistent with the treatment of checks in tax law. A taxpayer may deduct expenses paid by a check delivered on or before December 31 against that year's income even though the drawee bank does not honor the check until the next calendar year.[2] Insofar as possible, it is wise to interpret statutes regulating commercial behavior consistently with established practices in the business community. The custom that treats the delivery of a check as payment

---

at 162. Thus, the relevance of the legislative history, even for purposes of interpreting § 547(c), appears to have been somewhat undermined; given this, it would clearly be inappropriate to extrapolate from that history for purposes of interpreting the scope of §§ 547(b) and 101(54).

[1] See, *e. g.*, *Regents of University of New Mexico* v. *Lacey*, 107 N. M. 742, 744, 764 P. 2d 873, 875 (1988) ("[I]f, when the check is delivered, the drawer has funds in the drawee bank to meet it, and the check is honored and paid upon presentment, the conditional nature of the payment becomes absolute and the date of payment will be deemed to have been made as of the date of the original delivery of the check"); 6 R. Anderson, Uniform Commercial Code § 3–802:19, pp. 594–595 (3d ed. 1984) ("When a check is paid, the payment of the underlying debt becomes absolute and it is deemed paid as of the date of the giving of the check").

[2] See, *e. g.*, *Clark* v. *Commissioner*, 253 F. 2d 745, 748 (CA3 1958); see also *Don E. Williams Co.* v. *Commissioner*, 429 U. S. 569, 572, n. 2, 582–583 (1977). Treasury regulations similarly provide that a charitable contribution is made upon delivery of a check which subsequently clears in due course. Treas. Reg. § 1.170A–1(b), 26 CFR § 1.170A–1(b) (1991).

should not be rejected unless Congress has unequivocally commanded a contrary result. In the Bankruptcy Code, Congress has done no such thing. On the contrary, the Code is entirely consistent with the normal practice.

The definition of the term "transfer" in § 101(54) is plainly broad enough to encompass the conditional transfer of the right to funds in the debtor's bank account that occurs when the debtor delivers a check to a creditor. Section 101(54) defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . ." 11 U. S. C. § 101(54) (1988 ed., Supp. II). A check[3] is obviously a "mode" through which the debtor may "par[t] with property."[4]

Of course, the fact that delivery of a check effects a "transfer" within the meaning of the Code does not answer the question whether the trustee may avoid the transfer by check in this case because § 547(b) only authorizes the trustee to avoid transfers made "on or within 90 days before the date of the filing of the [bankruptcy] petition." 11 U. S. C. § 547(b)(4)(A). That raises the question: When did the "transfer" occur? Section 547(e)(2) provides the answer. It states that for purposes of the preference avoidance section, § 547, a transfer is made:

---

[3] A check is an order, signed by the maker, to the drawee bank to pay the sum stated upon demand. See Uniform Commercial Code § 3–104, 2 U. L. A. 224 (1991).

[4] The fact that "[m]yriad events can intervene between delivery and presentment of the check that would result in the check being dishonored," *ante*, at 399, does not alter this conclusion because § 101(54) expansively defines the term "transfer" to include even conditional modes of parting with property. In my opinion, the delivery of a check effects such a conditional transfer because upon delivery, the transferee receives a conditional right to funds in the bank account of the maker—the condition being acceptance by the drawee bank.

"(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

"(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days . . . ." § 547(e)(2).

The Court interprets this section as supporting its conclusion that the transfer does not occur until the check is honored by the drawee bank because, it reasons, a transfer cannot take effect between the transferor and transferee as long as the transferor retains the ability to stop payment on the check. *Ante*, at 401. But that reasoning is foreclosed by § 101(54), which states that even a conditional transfer is a "transfer" for purposes of the Code. Because delivery of a check effects a conditional transfer from the transferor to the transferee, the "transfer" is made, for purposes of § 547, on the date of delivery, provided that the transfer is "perfected" within 10 days as required by § 547(e)(2).

As the Court of Appeals for the Seventh Circuit recognized, the use of the term "perfected" is "jarring" because the meaning of the word "perfected" is not immediately apparent in this context. *Global Distribution Network, Inc.* v. *Star Expansion Co.*, 949 F. 2d 910, 913 (1991). "Debtors transfer assets; creditors perfect security interests." *Ibid.* The answer lies in the fact that the term "perfected" has a broader meaning in § 547(e) than it does in the Uniform Commercial Code. Section 547(e)(1)(B) states that "a transfer of . . . property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." Under this definition, a transfer by check is "perfected" when the check is honored because after that time no one can acquire a judicial lien superior to the interest of the transferee.

Thus §§ 101(54) and 547, when read together, plainly indicate that a "transfer" by check occurs on the date the check

is delivered to the transferee, provided that the drawee bank honors the check within 10 days. If, however, the check is not honored within 10 days, the "transfer" occurs on the date of honor.

An additional consideration reinforces this interpretation of the statutory text. The Courts of Appeals are unanimous in concluding that the date of delivery of a check is controlling for purposes of § 547(c), and the Court does not dispute that conclusion for the purposes of its decision today. *Ante*, at 402–403, n. 9. These Courts of Appeals decisions are consistent with the legislative history,[5] which, though admittedly not conclusive, identifies the date of delivery of a check as the date of transfer for purposes of § 547(c).[6] Normally, we assume that the same terms have the same meaning in different sections of the same statute. See, *e. g.*, *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990). That rule is not inexorable, but nothing in the structure or purpose of §§ 547(b) and 547(c) suggests a reason for interpreting these adjacent subsections differently.[7]

I would therefore reverse the judgment of the Court of Appeals.

---

[5] Indeed, many of these decisions rely on the legislative history. See, *e. g.*, *In re Continental Commodities, Inc.*, 841 F. 2d 527, 530 (CA4 1988); *In re White River Corp.*, 799 F. 2d 631, 633 (CA10 1986); *O'Neill* v. *Nestle Libbys P. R., Inc.*, 729 F. 2d 35, 37 (CA1 1984).

[6] As the Court recognizes, *ante*, at 401, sponsors of the legislation in the House and Senate made identical statements to this effect.

[7] As the Court of Appeals for the Sixth Circuit cogently explained: "The policy of section 547(b) is to set aside transfers that potentially prefer selected creditors; section 547(c), in turn, defines groups of creditors who are excepted. To give the word 'transfer' a different meaning in these complementary subparts seems inconsistent, unworkable, and confusing." *In re Belknap, Inc.*, 909 F. 2d 879, 883 (1990).

Syllabus

NATIONAL RAILROAD PASSENGER CORPORATION ET AL. *v.* BOSTON & MAINE CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90–1419. Argued January 13, 1992—Decided March 25, 1992*

The Rail Passenger Service Act of 1970 (RPSA) created petitioner National Railroad Passenger Corporation (Amtrak), a private corporation, to provide intercity and commuter rail passenger service. The Act permits Amtrak to enter into "trackage rights" agreements to use tracks owned and used by freight railroads, 45 U. S. C. § 562(a), and allows Amtrak to ask petitioner Interstate Commerce Commission (ICC) to condemn railroad property "required for intercity rail passenger service" if Amtrak and the railroad cannot agree upon sale terms, § 562(d). For purposes of the ICC's condemnation order, Amtrak's "need for the property" "shall be deemed to be established" unless the conveyance will significantly impair the railroad's ability to carry out its obligations as a common carrier and unless Amtrak's obligations can adequately be met by the acquisition of alternative property. *Ibid.* Amtrak had a "trackage rights" agreement with respondent Boston and Maine Corporation (B&M) to operate its "Montrealer" train between Washington, D. C., and Montreal. Amtrak claims it was forced to discontinue this service because of B&M's poor maintenance of its track segment. Subsequently, Amtrak entered into an agreement with petitioner Central Vermont Railroad (CV) which provided that, among other things, Amtrak would acquire the B&M track and reconvey it to CV, and CV would grant trackage rights to Amtrak and usage rights to B&M. When B&M did not accept Amtrak's purchase offer for the track, Amtrak sought, and received, an ICC order compelling conveyance for just compensation. The ICC found, among other things, that § 562(d) created a statutory presumption of Amtrak's need for the track, which B&M failed to rebut. The Court of Appeals remanded the case for further proceedings, concluding that, because Amtrak did not intend to retain the track, it needed only its use, not its ownership. While petitions for rehearing were pending, § 562(d) was amended to allow Amtrak to subsequently convey title to acquired property to a third party if the ICC finds the reconveyance furthers the RPSA's purposes. Nonetheless, the court

---

*Together with No. 90–1769, *Interstate Commerce Commission et al.* v. *Boston & Maine Corp. et al.*, also on certiorari to the same court.

denied rehearing, holding that the condemnation was not valid because the property was not "required for intercity rail passenger service."

Held:

1. The ICC's decision was based on a reasonable interpretation and application of § 562(d). Pp. 417–424.

(a) The ICC's interpretation of the word "required" is due deference as a reasonable interpretation of an ambiguous term in a statute that the ICC administers. See, *e. g., Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. The existence of alternative dictionary definitions for "required" indicates that the statute is open to interpretation. The ICC's interpretation gives effect to § 562(d)'s presumption of need. In contrast, the Court of Appeals' view—that "required" establishes a separate condition that Amtrak's condemnation authority is limited to property that is indispensable to its operations—is in clear tension with the presumption. In addition, § 562(d)'s amendment confirms the ICC's definition, while the Court of Appeals' strict rule would make the amendment superfluous by barring condemnation whenever Amtrak's purpose is to reconvey property. Pp. 417–420.

(b) The ICC was not required to make specific findings regarding Amtrak's actual need for the condemnation because its oversight responsibility is limited to ensuring that condemned property will be used in Amtrak's rail operations. The statute's structure and its presumption of need create a strong inference that it authorizes Amtrak to make a reasonable business judgment that condemnation is advisable, unless the statutory presumption is rebutted. Pp. 420–421.

(c) B&M's several arguments against the ICC's interpretation are rejected. The eminent domain power has been given to the ICC, not a private entity, and thus is not limited as suggested by cases such as *United States* v. *Carmack*, 329 U. S. 230, 243, n. 13. Furthermore, these cases turn on the need for deference to the ICC, not to Amtrak. The ICC's interpretation of § 562(d) also did not violate the "public use" requirement of the Fifth Amendment's Takings Clause, since the ICC's determination that the condemnation will serve a public purpose by facilitating Amtrak's rail service was not irrational. See, *e. g., Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 240–241. Moreover, the ICC did not err in concluding that the statutory prerequisite that the parties were "unable to agree upon terms for the sale" mandated nothing more than a factual determination that they would be unable to reach agreement through further negotiations. Nor did it make inadequate factual findings in concluding that B&M had not rebutted the presumption of need. The ICC was not unreasonable in consid-

ering the effect of trackage rights and the just compensation award in assessing whether the conveyance would significantly impair B&M's ability to carry out its obligations, or in interpreting the availability-of-alternative-property provision as referring only to whether Amtrak could provide service using an alternative route, not whether a lesser interest in property would suffice to meet Amtrak's needs. Pp. 421–424.

2. The parties' challenges to the ICC's just compensation finding as well as certain other issues should be resolved on remand. P. 424.

286 U. S. App. D. C. 1, 911 F. 2d 743, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, and SOUTER, JJ., joined. WHITE, J., filed a dissenting opinion, in which BLACKMUN and THOMAS, JJ., joined, *post*, p. 424.

Acting Solicitor General Roberts argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 90–1769 were *Deputy Solicitor General Wallace, Michael R. Dreeben, Robert S. Burk, Henri F. Rush,* and *Charles A. Stark. Robert P. vom Eigen, Charles I. Appler, Theodore A. Howard, Richard F. Riley, Jr., Louis R. Cohen, Stephen C. Rogers,* and *Frederick C. Ohly* filed briefs for petitioners in No. 90–1419.

Irwin Goldbloom argued the cause for respondents in both cases and filed a brief for respondent Boston & Maine Corporation. *Jeffrey L. Amestoy,* Attorney General of Vermont, *John K. Dunleavy,* Assistant Attorney General, *Rex E. Lee, G. Paul Moates, Ronald S. Flagg, Robert J. Baum,* and *Michael F. McBride* filed a brief for respondents State of Vermont et al.†

JUSTICE KENNEDY delivered the opinion of the Court.

The Interstate Commerce Commission (ICC or Commission) issued an order, upon the request of petitioner National

†*Laurence Z. Shiekman, Paul A. Cunningham, Robert M. Jenkins III,* and *Bruce B. Wilson* filed a brief for Concerned Railroads as *amicus curiae* urging affirmance.

Railroad Passenger Corporation, requiring conveyance of 48.8 miles of railroad track from respondent Boston and Maine Corporation (B&M) to the Corporation. In these consolidated cases we must decide whether the ICC's decision was based on a reasonable interpretation and application of § 402(d) of the Rail Passenger Service Act, 45 U. S. C. § 562(d), the statute the Corporation invoked in the proceeding. We hold the ICC's decision is authorized by the statute, and so reverse the judgment of the Court of Appeals for the District of Columbia Circuit, which set aside the Commission's action.

I

The National Railroad Passenger Corporation, or Amtrak, is a private, for-profit corporation created by Congress in the Rail Passenger Service Act of 1970 (RPSA), Pub. L. 91–518, 84 Stat. 1328, 45 U. S. C. § 501 *et seq.* The purpose of Amtrak is to provide modern and efficient intercity and commuter rail passenger service. §§ 501, 541. Amtrak is not an agency or instrumentality of the United States Government, § 541, but it has been supported over the years by congressional appropriations. Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads. In the RPSA Congress authorized Amtrak to enter into "trackage rights" agreements which would allow Amtrak to use those tracks. When Amtrak and a freight railroad are unable to agree on the terms of such an agreement, Amtrak may request the ICC to order the track to be provided on reasonable terms. § 562(a).

In 1973 Congress amended the RPSA to add subsection (d) of § 402, 45 U. S. C. § 562(d). Section 562(d) provides in pertinent part:

> "(1) If the Corporation [Amtrak] and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger

> service, the Corporation may apply to the Commission [ICC] for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—
>
> "(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> "(B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title,
>
> "the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation."

Amtrak may condemn nonrail property under a somewhat similar provision, § 545(d), a statute not at issue here.

The Amtrak train the "Montrealer" began offering passenger service between Washington, D. C., and Montreal in 1972. In parts of Massachusetts, Vermont, and New Hampshire the train used the tracks of the Connecticut River Line (Conn River Line), portions of which are owned by B&M and other portions by the Central Vermont Railroad (CV). B&M and CV have operated freight trains on the Conn River Line under reciprocal "trackage rights" agreements dating back to 1930.

In 1977 Amtrak entered into a "trackage rights" agreement with B&M under which B&M agreed to maintain its portions of the Conn River Line. Those portions include a 48.8-mile

segment of track on the Conn River Line between Brattleboro and Windsor, Vermont. This is the segment of track at issue here. At first the arrangement to maintain the track proceeded well, but in the early 1980's problems developed. Guilford Transportation Industries, Inc., purchased B&M out of bankruptcy, and purchased also a railroad operating a parallel line. Amtrak's claim is that neglect of track maintenance resulting from this purchase caused delays in Montrealer service. Maintenance of the Brattleboro-Windsor track was so poor that at points the train was slowed to five miles an hour. Negotiations for better maintenance were unsuccessful. In April 1987 Amtrak was forced to discontinue its Montrealer service.

Congress responded to these events in July 1987 by appropriating $5 million to upgrade the Montrealer route. Act of July 11, 1987, Pub. L. 100–71, 101 Stat. 447–448. Amtrak decided not to spend the money to upgrade the Conn River Line while B&M continued to own it, because in Amtrak's view B&M could not be relied upon to maintain the track once restored. Amtrak began negotiations with CV and, in early 1988, reached a preliminary agreement. Amtrak promised to use its statutory condemnation power to acquire the 48.8 miles of track in question, to at once reconvey the track to CV, and to provide up to $3.1 million to upgrade and rehabilitate the segment. In return, CV promised to provide the balance of the funds necessary to upgrade the track, to maintain the track for 20 years in a condition meeting Amtrak's standards, to grant Amtrak trackage rights for 20 years, and to grant B&M trackage rights to serve its existing customers. As a prerequisite to invoking § 562(d), Amtrak made an offer to B&M to purchase the segment for $1 million, on a take-it-or-leave-it basis. B&M offered to negotiate the terms under which it would be willing to upgrade the segment and stated: "[I]t appears clear that there is no need to pursue the very complex 'offer to purchase' set forth in your letter." App. 60. B&M's refusal to accept the offer

seems to have been anticipated by Amtrak and CV, as indicated by an internal CV Memorandum written in January 1988. App. 94.

Interpreting the B&M communication as a rejection of its offer, Amtrak instituted this proceeding before the ICC to compel conveyance of the track. CV filed a simultaneous request for an exemption from ICC regulation for its acquisition of the segment upon reconveyance from Amtrak.

B&M assessed the transaction as a significant shift in its long competition with CV for freight traffic. CV already owned large parts of the Conn River Line and after the proposed transaction it would own most of it. Though B&M would have trackage rights, CV would gain not only ownership of the segment, but also the right to obtain new customers on its route. B&M alleged this gave a new advantage to CV's corporate parent, the Canadian National Railway Company, for each railroad links up with competing companies in Canada. CV's lines link to Canadian National, while B&M's lines link to the Canadian Pacific, Ltd., Canadian National's competitor. B&M challenged the transaction as simply a device to shift ownership among railroads, not to give ownership to Amtrak, which, B&M argued, was the sole purpose of the condemnation provision.

B&M filed initial objections to the § 562(d) proceeding on two grounds: that Amtrak had not shown that the parties were unable to agree on reasonable terms of sale, and that § 562(d) did not authorize condemnation of railroad lines. The ICC rejected B&M's arguments and in a condemnation proceeding held that Amtrak had shown the inability of the parties to agree to terms. It ruled that § 562(d) covers railroad tracks because tracks are "rail property 'required for intercity rail passenger service.'" App. to Pet. for Cert. in No. 90–1419, pp. 130a–133a. B&M next sought to convert the proceeding into a trackage rights proceeding under § 562(a), but the ICC again rejected B&M's position, holding that Amtrak had an "election of remedies" under § 562 and

so had no obligation to seek trackage rights under subsection (a) before invoking subsection (d). *Id.*, at 115a–116a. Meanwhile, CV and the States of Vermont and Massachusetts, as well as numerous other parties, intervened in the ICC proceeding. (CV appears as a petitioner before this Court, and Vermont and Massachusetts support petitioners.)

This was the first decided case involving Amtrak's condemnation powers under § 562(d). *Id.*, at 39a. The ICC issued its final decision in 1988 and ordered conveyance of the segment with just compensation of $2,373,286. It reaffirmed earlier rulings and found that Amtrak "ha[d] met the statutory criteria for the institution of a proceeding" under § 562(d). *Id.*, at 40a–42a, 81a.

The ICC concluded that the presumption of Amtrak's need for the track contained in § 562(d)(1) was applicable. In its view both statutory criteria must be met to rebut the presumption, and B&M had established neither. As to alternative property (subsection (B)), the ICC found that no reasonable alternative route existed for the Montrealer service. And as to significant impairment of B&M's ability to carry out its common carrier obligations (subsection (A)), the ICC found that because B&M had been awarded just compensation and could continue to serve its customers under the "trackage rights" agreement which was part of the transaction, its ability had not been impaired. *Id.*, at 45a–46a. The bulk of the ICC's final decision deals with the question of just compensation, which is not before this Court. See *infra*, at 424.

On petition for review, a divided panel of the Court of Appeals for the District of Columbia Circuit granted the petition and remanded the matter to the ICC for further proceedings. 286 U. S. App. D. C. 1, 911 F. 2d 743 (1990). The majority held that § 562(d) does not permit Amtrak to condemn railroad property which it intends to reconvey to another railroad. It acknowledged that the ICC had inter-

preted § 562 in a different way, and that in the usual course judicial deference would be given to its interpretation under the principles enunciated in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984); but the court concluded that § 562(d) is unambiguous in light of its language and history, and so no deference was due. The panel majority reasoned that because Amtrak did not intend to retain the track to be condemned, it needed only its use, not its ownership. As Amtrak could obtain use of the property by obtaining either a "trackage rights" agreement under § 562(a), or by condemning an easement under § 562(d), the entire fee interest was not "'required for intercity rail passenger service.'" 286 U. S. App. D. C., at 8, 911 F. 2d, at 750. The majority stated that its holding was confirmed by other considerations, including: (1) the potential constitutional problems, under the Takings Clause, raised by the ICC's interpretation of § 562(d); (2) the structure of § 562, which indicated an intent on the part of Congress to relegate Amtrak to trackage rights under § 562(a) when seeking only the use of track; and (3) Congress' policy against cross-subsidization between sectors of the railroad industry, which the majority concluded would have been violated by this transaction. Judge Ruth B. Ginsburg concurred separately, rejecting the majority's interpretation of the statute, but concluding that a remand to the ICC was necessary because the ICC had not made adequate findings to determine whether Amtrak in fact needed to shift ownership of the segment from B&M to CV to protect its interests. *Id.*, at 11–13, 911 F. 2d, at 753–755. This factual question, whether Amtrak's portrayal of a recalcitrant B&M is accurate, remains in dispute. Under our resolution of the case, however, the issue need not be reached.

Amtrak and the ICC filed petitions for rehearing, and while the petitions were pending Congress amended § 562(d). The amendment, adopted in specific response to the Court of

Appeals' decision in this case, added the following sentence to § 562(d)(1): "The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act." Independent Safety Board Act Amendments of 1990 § 9(a), Pub. L. 101–641, 104 Stat. 4658. The amendment was made applicable to all pending cases, § 9(b), and B&M does not dispute that it applied in this case even while it was before the Court of Appeals on rehearing. Brief for Respondent B&M 33–35. The Court of Appeals considered the 1990 amendment, but denied rehearing nonetheless. 288 U. S. App. D. C. 196, 925 F. 2d 427 (1991). The panel majority held that while § 9 made it clear Amtrak was authorized to reconvey condemned property "*subsequent to* a condemnation that is otherwise valid under [§ 562(d)]," it did not change the statutory limitation that the property be "'required for intercity rail passenger service'" in the first place. *Id.*, at 197, 925 F. 2d, at 428 (emphasis in original). The majority reasoned that since its original decision was based on Amtrak's failure to satisfy that requirement, the amendment did not affect its holding. The majority also distinguished a case from the Second Circuit, *National Railroad Passenger Corp.* v. *Two Parcels of Land*, 822 F. 2d 1261, cert. denied, 484 U. S. 954 (1987), which had interpreted § 545(d)(1) (the provision authorizing Amtrak to condemn nonrail property) to permit reconveyance following condemnation. 288 U. S. App. D. C., at 196–197, 425 F. 2d, at 427–428. In a separate opinion, Judge Ginsburg wrote that the amendment confirmed her view that the ICC had not misinterpreted the statute, but that a remand remained necessary for further factual determinations.

Amtrak and CV, in No. 90–1419, and the ICC, in No. 90–1769, filed separate petitions seeking review of the Court of Appeals' decision. We granted certiorari and consolidated the cases. 502 U. S. 807 (1991). We now reverse.

II

The primary question raised by these cases is a straightforward matter of statutory interpretation: whether § 562(d), as amended, authorizes the condemnation and transaction approved by the ICC but set aside by the Court of Appeals. The Court of Appeals disallowed the transaction based on its own interpretation of the language "required for intercity rail passenger service" in § 562(d)(1). In so holding it limited Amtrak's condemnation authority to property that was necessary, in the sense of indispensable, to Amtrak's operations. The ICC interpreted the relevant statutory language to give Amtrak more latitude, and it is our task to determine whether the Commission had authority for its statutory interpretation.

Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law. We relied upon it in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and have reaffirmed it often. See, *e. g.*, *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 292–293 (1988); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696–697 (1991). These decisions mandate that when a court is reviewing an agency decision based on a statutory interpretation, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U. S. A.*, *supra*, at 843. If the agency interpretation is not in conflict with the plain language of the statute, deference is due. *K mart Corp.*, 486 U. S., at 292. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. *Id.*, at 291; *Sullivan* v. *Everhart*, 494 U. S. 83, 89 (1990). If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though

a reviewing court need not accept an interpretation which is unreasonable.

Under these principles the ICC's interpretation of § 562(d) was permissible, and the Court of Appeals' decision was in error to disregard it. While the ICC's opinion is not explicit in all of its details, the Commission's decision is based on a reading of the statute quite different from the Court of Appeals'. The ICC agreed that property Amtrak seeks to condemn under § 562(d) must be "required for intercity rail passenger service." It determined, however, that the word "required" need not mean, as the Court of Appeals' opinion suggests, indispensable or necessary. Instead, the ICC gave effect to the statutory presumption of Amtrak's need for the track, and in so doing implemented and interpreted the statute in a manner that comports with its words and structure. The analysis of the Court of Appeals is inconsistent with the Commission's interpretation of the statutory presumption of need. The ICC's position before the Court is that "required" can also mean "useful or appropriate," Brief for Petitioners in No. 90–1769, p. 17, and that the order under review adopted that meaning. We agree that the manner in which the ICC has applied the statute in this case has that interpretation as its basic premise. App. to Pet. for Cert. in No. 90–1419, pp. 42a–46a.

In its brief the ICC cites a dictionary definition in support of its view. Brief for Petitioners in No. 90–1769, p. 17, citing Webster's Third New International Dictionary 1929 (1986). The existence of alternative dictionary definitions of the word "required," each making some sense under the statute, itself indicates that the statute is open to interpretation. See *Sullivan* v. *Everhart, supra.* Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context. Further, the structure of the provision reinforces our conclusion that statutory interpretation is appropriate and that the Court of Appeals' interpretation is itself open to serious question.

The court defined the word "required" to establish a separate condition that the property sought to be condemned be necessary (indispensable) for Amtrak's operations, a view which is not without support. See, *e. g.*, American Heritage Dictionary of the English Language 1105 (2d ed. 1981). This interpretation, though, leaves little substance to the statutory presumption in favor of Amtrak's need and so is in clear tension with that part of the statute.

We decide that § 562(d) is ambiguous in some respects and conclude that the ICC's interpretation of the word "required" is a reasonable one. We defer to its interpretation. This is not to say that the issue is beyond dispute, but these alternative interpretations are as old as the jurisprudence of this Court. In *McCulloch* v. *Maryland*, 4 Wheat. 316, 413 (1819), Chief Justice Marshall, in a choice of interpretations with some parallels to this one, read the word "necessary" to mean "convenient, or useful," rejecting a stricter reading of the term which would have limited congressional power under the Constitution to the "most direct and simple" means available. We think that as a matter of definition and interpretation in the context of this statute it is plausible, if not preferable, to say that Amtrak can find that an acquisition is required when it is a useful and appropriate way to accomplish its goals.

The Commission's interpretation is consistent also with the 1990 statutory addition enacted by Congress. While the amendment does not modify the specific language of § 562(d) at issue here, it confirms the ICC's view. The interpretation given to § 562(d) by the Court of Appeals and B&M, on the other hand, would make the amendment superfluous, because if the word "required" has the strict meaning they seek to attribute to it, condemnations by Amtrak would seem to be barred whenever Amtrak's purpose is to reconvey the property.

Contrary to the position of the dissent, we are not "deferring to what we imagine an agency had in mind." *Post*, at

428. Rather, we defer to an interpretation which was a necessary presupposition of the ICC's decision. We recognize the well-established rule that an agency's action may not be upheld on grounds other than those relied on by the agency. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943). But the fact that the ICC did not in so many words articulate its interpretation of the word "required" does not mean that we may not defer to that interpretation, since the only reasonable reading of the Commission's opinion, and the only plausible explanation of the issues that the Commission addressed after considering the factual submissions by all of the parties, is that the ICC's decision was based on the proffered interpretation. *Chenery* does not require a remand under those circumstances. It is noteworthy in this regard that neither party contends the ICC's decision was not informed and governed by this statutory interpretation. B&M's primary argument to the Court is that the word required must mean necessary. Brief for Respondent B&M 16, 22, 44. But this, as we have said, is quite inconsistent with the statutory presumption of need to which the ICC gave effect.

There is no dispute on this record that Amtrak intends to use the condemned track for its Montrealer service. Under the ICC's view that use is sufficient to satisfy the statutory command that the rail property be "required for intercity rail passenger service." This is a reasonable interpretation and application of the RPSA. And it ends the judicial inquiry on this point.

What we have said also answers Judge Ginsburg's concern that the ICC must make specific findings regarding Amtrak's actual need for the condemnation. The contention that such a finding was necessary, to implement the statutory criterion that the property be "required for intercity rail passenger service," was the basis for Judge Ginsburg's concurrence in the Court of Appeals. 286 U. S. App. D. C., at 12, 911 F. 2d, at 754. That position, however, appears to be based on the same interpretation of the word "required" as that adopted

by the Court of Appeals' majority, and so is inconsistent with the ICC's interpretation. The ICC contends that the factual finding is not mandated. It argues that the structure of the statute, combined with the presumption created by the statute of Amtrak's need for the property sought, creates a strong inference that the statute authorizes Amtrak to make a reasonable business judgment that condemnation of the property is advisable. We agree. The ICC's oversight responsibility, exercised by enforcing the "required for intercity rail passenger service" language as interpreted by the Commission, is limited to ensuring that the condemned property will be used in Amtrak's rail operations. The further determination of need is delegated to Amtrak, unless the statutory presumption is rebutted; and it is not rebutted here. Indeed, as our discussion above indicates, *supra*, at 418–419, it seems to us that any other interpretation may be inconsistent with the statutory presumption of need. In all events, the ICC's interpretation is a reasonable one, and we may not substitute a different view.

Arguing against the ICC's interpretation, B&M cites to us cases such as *United States* v. *Carmack*, 329 U. S. 230, 243, n. 13 (1946), which suggest that delegations of eminent domain power to private entities are of a limited nature. We do not believe that argument has any relevance here because Amtrak does not exercise eminent domain power under § 562(d). Rather, the statute gives that power to the ICC, a Government agency. To be sure, the statute creates a presumption in favor of conveyance to Amtrak. But the ICC must assess the impact of any condemnation and make a determination as to just compensation. Since § 562(d) is a proper exercise of regulatory authority, and the ICC's oversight of Amtrak is intended to ensure compliance with the statute, the eminent domain power here is not private.

Furthermore, this case turns on the need for deference to the ICC, not Amtrak. There is nothing in the cases B&M cites contradicting the rule of judicial deference to an

agency's statutory interpretation, even when the statute is one authorizing condemnation of private property. In short, the principle advanced by B&M does not prevail over *Chevron*'s rule of deference.

We also reject B&M's constitutional objections. B&M claims that § 562(d) as interpreted by the Commission violates the "public use" requirement of the Fifth Amendment's Takings Clause, because the transaction leaves unchanged the use made by Amtrak of the condemned track. B&M's position cannot be reconciled with our precedents. We have held that the public use requirement of the Takings Clause is coterminous with the regulatory power, and that the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking "is rationally related to a conceivable public purpose." *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 240–241 (1984); see also *Berman* v. *Parker*, 348 U. S. 26, 32–34 (1954). In *Midkiff* we upheld land reform legislation which authorized condemnations for the specific purpose of transferring ownership to another private party, in order to eliminate a land oligopoly. In *Berman* we permitted land condemnations which contemplated reselling the land to redevelopers, as part of a plan to restore dilapidated sections of the District of Columbia. In both *Midkiff* and *Berman*, as in the present case, condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged. The Court held these exercises of the condemnation power to be constitutional, as long as the condemning authorities were rational in their positions that some public purpose was served. Those holdings control here, for there can be no serious argument that the ICC was irrational in determining that the condemnation will serve a public purpose by facilitating Amtrak's rail service. That suffices to satisfy the Constitution, and we need not make a specific factual determination whether the con-

demnation will accomplish its objectives. *Midkiff, supra,* at 242–243.

As a last effort, B&M argues that this matter must be remanded to the ICC because the Commission did not make adequate and accurate findings regarding several different matters. B&M claims that Amtrak failed to prove the parties were "'unable' to agree" on terms of sale. In B&M's view, § 562(d) demands that Amtrak engage in "good faith . . . negotiations" before it may invoke its condemnation powers. Brief for Respondent B&M 42. The ICC construed the language of § 562(d) in a more narrow fashion, to mandate nothing more than a factual determination that the parties will not be able to reach agreement through further negotiations. App. to Pet. for Cert. in No. 90–1419, pp. 130a–131a ("Nothing in this record provides any indication that Amtrak and B&M will ever reach agreement on terms of sale"). This is a reasonable interpretation of the phrase "unable to agree upon terms for the sale," and we do not substitute a different view. Thus the Commission did not err in concluding that this statutory prerequisite was satisfied.

B&M argues further that the ICC made inadequate factual findings in concluding: (1) that this conveyance will not significantly impair B&M's ability to carry out its obligations as a common carrier, § 562(d)(1)(A); and (2) that Amtrak's obligations cannot be met by the acquisition of alternative property, § 562(d)(1)(B). As to significant impairment, B&M's argument, like the decision of the Court of Appeals on this point, 286 U. S. App. D. C., at 8–9, 911 F. 2d, at 750–751, relies on the notion that in assessing impairment the ICC may consider only the conveyance itself, not any mitigating measures adopted in response to the conveyance, such as the grant of trackage rights to B&M. We find no basis in the text or structure of § 562(d) for this position and cannot say that the statute must be interpreted to mandate such a restrictive inquiry. The ICC was not unreasonable in considering the effect of the "trackage rights" agreements and the just com-

pensation award in assessing significant impairment; and the ICC's conclusion, that B&M's ability to carry out its common carrier obligations will not be impaired by the transaction in any significant way, is supported by substantial evidence. As to the availability of alternative property, the ICC interpreted that provision as referring only to whether Amtrak could provide service using an alternative route, not whether a lesser interest in property would suffice to meet Amtrak's needs. Again, this was a reasonable reading to which we defer. Since B&M would have to prevail on both the significant impairment and alternative property issues to rebut Amtrak's presumption of need, there can be no doubt that the ICC's finding that Amtrak established its need for the property must be affirmed.

III

For the reasons we have stated, we hold that the ICC did not exceed its authority in ordering conveyance of the 48.8-mile segment of the Conn River Line from B&M to Amtrak. Because of its contrary holding on this point, the Court of Appeals did not address the parties' challenges to the ICC's just compensation finding as well as certain other issues. *Id.*, at 11, 911 F. 2d, at 753. These questions should be resolved on remand. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE THOMAS join, dissenting.

The majority opinion proceeds from the well-established principle that courts should defer to permissible agency interpretations of ambiguous legislation.[1] *Chevron U. S. A.*

[1] I agree with the majority that the Court of Appeals erred in concluding that § 402(d) of the Rail Passenger Service Act (RPSA), 45 U. S. C. § 562(d), unambiguously prohibits transactions such as the sale and leaseback ar-

Inc. v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696–697 (1991). I have no quarrel with that general proposition. I do, however, object to its invocation to justify the majority's deference, not to an agency interpretation of a statute, but to the *post hoc* rationalization of Government lawyers attempting to explain a gap in the reasoning and factfinding of the Interstate Commerce Commission (ICC or Commission). *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 50 (1983).

Section 402(d) of the RPSA, codified at 45 U. S. C. § 562(d), provides that Amtrak may apply to the ICC for an order directing the conveyance of another railroad's property *if* Amtrak can meet two conditions: Amtrak and the other railroad must be unable to agree upon terms for sale of the property, and the property must be "required for intercity rail passenger service." If these conditions are met, "the need of [Amtrak] for the property shall be deemed to be established," and the other railroad will be able to retain its property only if it can rebut the strong presumption of Amtrak's need. *Ibid.*

Because conferring upon Amtrak the presumption of need will determine the outcome of most disputes under this section, the two conditions that Amtrak must establish to receive the benefit of the presumption assume particular importance. However, in the present case, the ICC failed to address one of these factors. Although the Commission determined that the parties had been unable to come to terms for sale of the disputed property, see App. to Pet. for Cert. in No. 90–1419, pp. 130a–131a, it neither interpreted nor applied the second condition, that the property be "required

---

rangement between Amtrak and the Central Vermont Railroad. Legislation passed while this case was pending before the Court of Appeals makes it clear that such transactions are permissible. Independent Safety Board Act Amendments of 1990 § 9(a), Pub. L. 101–641, 104 Stat. 4658.

for intercity rail passenger service." Instead, after rejecting respondent Boston & Maine Corporation's argument that Amtrak could restore Montrealer service by obtaining trackage rights or an easement, the ICC simply concluded that "Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line." *Id.*, at 43a.

The majority acknowledges that "the ICC's opinion is not explicit in all of its details," see *ante*, at 418, but nevertheless concludes that the Commission's reading of the statute is entitled to deference because it "gave effect to the statutory presumption of Amtrak's need for the track, and in so doing implemented and interpreted the statute in a manner that comports with its words and structure." *Ibid.* But this begs the question of what showing Amtrak must make to establish that the track is "required" so that Amtrak may therefore obtain the benefit of the presumption of need.

The simple fact is that *the ICC never addressed this point*, and therefore failed to construe a key portion of the statute. The omission is particularly significant because this is the first action treating Amtrak's condemnation powers under § 402(d) of the Act; it will guide future adjudications.

Rather than acknowledging the ICC's omission and remanding for clarification and factfinding, the majority relies on the Government's argument that the Commission must have interpreted the word "required" as meaning "useful or appropriate." *Ibid.* But this interpretation was not developed by the ICC during its administrative proceedings. Indeed, the explanation was not even proposed in the Commission's argument to the Court of Appeals.[2] This ICC

[2] This is how the Commission framed its argument to the Court of Appeals:

"Under *Chevron* [*U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984)], the Commission had broad discretion to interpret RPSA in this proceeding. This is certainly true with regard to the central issu[e] of determining . . . what must be shown to justify a taking under section 402(d) . . . . As to [this] issue, the statute merely states that Amtrak's need for the property will be presumed unless the transfer will significantly impair the ability of the carrier to carry out its common

definition of "required" debuted in the Commission's briefs before this Court. It is nothing more than a creation of appellate counsel, concocted to fill the gaps in the Commission's analysis. "The short—and sufficient—answer to [this] submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . It is well established that an agency's action must be upheld, if at all, on the basis *articulated* by the agency itself." *Motor Vehicle Mfrs. Assn., supra,* at 50 (emphasis added), citing *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 168 (1962); *SEC* v. *Chenery Corp.,* 332 U. S. 194, 196–197 (1947); *American Textile Mfrs. Institute, Inc.* v. *Donovan,* 452 U. S. 490, 539 (1981). Therefore, the majority is simply wrong in asserting that, even though "the ICC did not in so many words *articulate* its interpretation of the word 'required,'" the Court may nevertheless defer to the Commission's decision. See *ante,* at 420 (emphasis added).

Because of the gap in the ICC's interpretation of the statute, "[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." *Burlington Truck Lines, Inc., supra,* at 167. The majority concludes, again based on the agency's presumed interpretation of the statute, that the Commission was not obligated to make specific findings as to whether the property was "'required for intercity rail passenger service.'" See *ante,* at 420. This magnifies the ICC's mistake; an administrative "agency must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc.,* 371 U. S., at 168.

Deferring to a federal agency's construction of the legislation that it is charged with administering is one thing. But deferring to inferences derived from reading between the lines of an agency decision or excerpted from the brief of

---

carrier obligations *and* Amtrak's needs can be met with alternative property." Joint Brief for Respondents in No. 88–1631 (CADC), pp. 15–16.

a Government lawyer is another matter entirely. "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Id.*, at 169. Because the ICC has failed to provide a clear, authoritative construction of "required for intercity rail passenger service," we should return this case to the Commission so that the agency can do its job properly. But we should not strain the *Chevron* principle by deferring to what we imagine an agency had in mind when it applied a statute. Therefore, I respectfully dissent.

Syllabus

ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, ET AL. *v.* SEATTLE AUDUBON SOCIETY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–1596. Argued December 2, 1991—Decided March 25, 1992

Respondent environmental groups filed separate lawsuits challenging proposed timber harvesting in certain forests managed by the United States Forest Service and the Bureau of Land Management (BLM). These forests are home to the northern spotted owl, an endangered species. Between them, the two lawsuits alleged violations of five federal statutes. The lower courts preliminarily enjoined some of the challenged harvesting. In response to this ongoing litigation, Congress enacted § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, also known as the Northwest Timber Compromise. Section 318 both required harvesting and expanded harvesting restrictions. Subsections (b)(3) and (b)(5) prohibited harvesting altogether in various designated areas, and subsection (b)(6)(A) stated in part that "Congress hereby determines and directs that management [of the forests] according to subsections (b)(3) and (b)(5) . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the two cases,]" which were identified by name and caption number. Both District Courts rejected respondents' claims that subsection (b)(6)(A) violated Article III of the Constitution by purporting to direct results in two pending cases. The Court of Appeals reversed, holding the provision unconstitutional under *United States* v. *Klein*, 13 Wall. 128, on the ground that Congress directed a particular decision in the cases without repealing or amending the statutes underlying the litigation.

Held: Subsection (b)(6)(A) does not violate Article III. Pp. 437–441.

(a) The provision compelled changes in law, not results under old law, by replacing the legal standards underlying the two original cases with those set forth in subsections (b)(3) and (b)(5). Before its enactment, respondents' claims would fail only if the challenged harvesting violated none of the provisions of the five statutes that formed the basis for the original lawsuits. Under subsection (b)(6)(A), however, the claims would fail if the harvesting satisfied both of two new provisions. Thus, subsection (b)(6)(A)'s operation modified the old provisions. Moreover,

Syllabus

there is nothing in the subsection that purported to direct any particular findings of fact or applications of law to fact. Section 318 reserved judgment on the lawfulness of the timber sales under old law. It did not instruct the courts whether any particular timber sales would violate subsections (b)(3) or (b)(5); and it could not instruct that any particular BLM timber sales were lawful, because subsection (b)(5) incorporated by reference the harvesting prohibitions imposed by a BLM agreement not yet in existence when the Compromise was enacted. Pp. 437–439.

(b) The three textual features of subsection (b)(6)(A) cited by respondents do not support their argument that the provision directed findings under old law, rather than supplying new law. The inclusion of the preface "Congress . . . directs that" does not undermine the conclusion that what Congress directed—to both courts and agencies—was a change in law. Nor is it significant that the subsection deemed compliance with the new requirements to "mee[t]" the old requirements. Although Congress could have modified the old laws directly, its enactment of an entirely separate statute modified the old laws through operation of the canon that specific provisions qualify general ones. Finally, the subsection's explicit reference to the two pending cases served only to identify the five statutory requirements that were the basis for those cases. Pp. 439–440.

(c) The Court of Appeals' alternative holding that the provision could not effect an implied modification of substantive law because it was embedded in an appropriations measure is also without merit. Congress may amend a substantive law in an appropriations statute if it does so clearly, see, *e. g., United States* v. *Will*, 449 U. S. 200, 222, and it did so explicitly here. In addition, having determined that the provision would be unconstitutional unless it modified previously existing law, the court was obligated to impose that saving interpretation as long as it was a possible one. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30. Pp. 440–441.

(d) Since subsection (b)(6)(A) did amend applicable law, there is no reason to address the Court of Appeals' interpretation of *Klein*. The argument of one of respondents' *amici*—that the provision is unconstitutional even if it amended law because it swept no more, or little more, broadly than the range of applications at issue in the pending cases—was not raised below, squarely considered by the Court of Appeals, or advanced by respondents here. P. 441.

914 F. 2d 1311, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

Solicitor General Starr argued the cause for petitioners. With him on the briefs were *Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Clifford M. Sloan, Peter R. Steenland, Jr., Martin W. Matzen,* and *Anne S. Almy.*

Todd T. True argued the cause for respondents. With him on the brief for respondents Seattle Audubon Society et al. were *John Bonine, Michael Axline,* and *Victor M. Sher. Phillip D. Chadsey* filed a brief for respondents Association of O & C Counties et al. *Mark C. Rutzick* filed briefs for respondents Northwest Forest Resource Council et al.*

JUSTICE THOMAS delivered the opinion of the Court.

In this case we must determine the operation of § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990.

I

This case arises out of two challenges to the Federal Government's continuing efforts to allow the harvesting and sale of timber from old-growth forests in the Pacific Northwest. These forests are home to the northern spotted owl, a bird listed as threatened under the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.* (1988 ed. and Supp. II), since June 1990. See 55 Fed. Reg. 26114. Harvesting the forests, say environmentalists, would kill the owls. Restrictions on harvesting, respond local timber industries, would devastate the region's economy.

---

*Briefs of *amici curiae* urging affirmance were filed for the State of Florida et al. by *Robert A. Butterworth,* Attorney General of Florida, *Jonathan Glogau,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Richard Blumenthal* of Connecticut, *Michael E. Carpenter* of Maine, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *Robert J. Del Tufo* of New Jersey, *Nicholas J. Spaeth* of North Dakota, *Lee Fisher* of Ohio, and *Dan Morales* of Texas; and for Public Citizen by *Patti A. Goldman, Alan B. Morrison,* and *David C. Vladeck.*

Petitioner Robertson is Chief of the United States Forest Service, which manages 13 national forests in Oregon and Washington known to contain the northern spotted owl. In 1988, the Service amended its regional guide to prohibit timber harvesting on certain designated areas within those forests. Respondent Seattle Audubon Society (joined by various other environmental groups) and the Washington Contract Loggers Association (joined by various other industry groups) filed separate lawsuits in the District Court for the Western District of Washington, complaining respectively that the amendment afforded the owl either too little protection, or too much. Seattle Audubon alleged violations of three federal statutes: the Migratory Bird Treaty Act (MBTA), 40 Stat. 755, ch. 128, as amended, 16 U. S. C. § 703 *et seq.* (1988 ed. and Supp. II); the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, as amended, 42 U. S. C. § 4321 *et seq.*; and the National Forest Management Act of 1976 (NFMA), 90 Stat. 2949, as amended, 16 U. S. C. § 1600 *et seq.* The District Court consolidated the actions and preliminarily enjoined 163 proposed timber sales. *Seattle Audubon Soc.* v. *Robertson*, No. 89–160 (WD Wash., Mar. 24, 1989).

Petitioner Lujan is Secretary of the Department of the Interior. The Bureau of Land Management (BLM), an agency within the Department, manages several old-growth forests in western Oregon. Between 1979 and 1983, the BLM developed timber management plans that permitted harvesting on some areas within these forests and prohibited it on others. In 1987, the BLM and the Oregon Department of Fish and Wildlife executed an agreement that expanded the areas on which harvesting was prohibited. Also in 1987, respondent Portland Audubon Society (among others) filed suit in the District Court for the District of Oregon, challenging certain proposed harvesting under four federal statutes: MBTA; NEPA; the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, as amended, 43

U. S. C. § 1701 *et seq.;* and the Oregon-California Railroad Land Grant Act (OCLA), 50 Stat. 874, 43 U. S. C. § 1181a. Twice, the District Court dismissed the action. Twice before reversing (on grounds not relevant here), the Court of Appeals for the Ninth Circuit enjoined some of the challenged harvesting pending appeal. See *Portland Audubon Soc.* v. *Lujan*, 884 F. 2d 1233, 1234 (1989), cert. denied, 494 U. S. 1026 (1990); *Portland Audubon Soc.* v. *Hodel*, 866 F. 2d 302, 304, cert. denied *sub nom. Northwest Forest Resource Council* v. *Portland Audubon Soc.*, 492 U. S. 911 (1989).

In response to this ongoing litigation, Congress enacted § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745, popularly known as the Northwest Timber Compromise. The Compromise established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain. By its terms, it applied only to "the thirteen national forests in Oregon and Washington and [BLM] districts in western Oregon known to contain northern spotted owls." § 318(i). It expired automatically on September 30, 1990, the last day of fiscal year 1990, except that timber sales offered under § 318 were to remain subject to its terms for the duration of the applicable sales contracts. § 318(k).

The Compromise both required harvesting and expanded harvesting restrictions. Subsections (a)(1) and (a)(2) required the Forest Service and the BLM respectively to offer for sale specified quantities of timber from the affected lands before the end of fiscal year 1990. On the other hand, subsections (b)(3) and (b)(5) prohibited harvesting altogether from various designated areas within those lands, expanding the applicable administrative prohibitions and then codifying them for the remainder of the fiscal year.[1] In addition, sub-

[1] Subsection (b)(3) provided:

"No timber sales offered pursuant to this section from the thirteen national forests in Oregon and Washington known to contain northern spotted owls may occur within [spotted owl habitat areas (SOHA's)] identified

sections (b)(1), (b)(2), and (b)(4) specified general environmental criteria to govern the selection of harvesting sites by the Forest Service. Subsection (g)(1) provided for limited, expedited judicial review of individual timber sales offered under § 318.

This controversy centers around the first sentence of subsection (b)(6)(A), which stated in part:

> "[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and

---

pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

"(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

"(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

"(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

"(D) For the Oregon Coast Range Province, which includes the Siuslaw National Forest, SOHA size is to be 2,500 acres; and

"(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

"(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted."

Subsection (b)(5) provided:

"No timber sales offered pursuant to this section on Bureau of Land Mangagement lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990."

(b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89–160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89–99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87–1160–FR."

Subsection (b)(6)(A) also declined to pass upon "the legal and factual adequacy" of the administrative documents produced by the 1988 Forest Service amendment and the 1987 BLM agreement.[2]

After § 318 was enacted, both the *Seattle Audubon* and *Portland Audubon* defendants sought dismissal, arguing that the provision had temporarily superseded all statutes on which the plaintiffs' challenges had been based. The

---

[2] In its entirety, subsection (b)(6)(A) provided:

"Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the Spotted Owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89–160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89–99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87–1160–FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States."

plaintiffs resisted on the ground that the first sentence of subsection (b)(6)(A), because it purported to direct the results in two pending cases, violated Article III of the Constitution. In *Seattle Audubon*, the District Court held that subsection (b)(6)(A) "can and must be read as a temporary modification of the environmental laws." *Seattle Audubon Soc.* v. *Robertson*, No. 89–160 (WD Wash., Nov. 14, 1989). Under that construction, the court upheld the provision as constitutional and therefore vacated its preliminary injunction. Nonetheless, the court retained jurisdiction to determine whether the challenged harvesting would violate § 318 (if done in fiscal year 1990) or other provisions (if done later). In *Portland Audubon*, the District Court likewise upheld subsection (b)(6)(A), but dismissed the action entirely (without prejudice to future challenges arising after fiscal year 1990). *Portland Audubon Soc.* v. *Lujan*, No. 87–1160 (Ore., Dec. 21, 1989).

The Ninth Circuit consolidated the ensuing appeals and reversed. 914 F. 2d 1311 (1990). The court held that the first sentence of § 318(b)(6)(A) "does not, by its plain language, repeal or amend the environmental laws underlying this litigation," but rather "directs the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases." *Id.*, at 1316. Given that interpretation, the court held the provision unconstitutional under *United States* v. *Klein*, 13 Wall. 128 (1872), which it construed as prohibiting Congress from "direct[ing] . . . a particular decision in a case, without repealing or amending the law underlying the litigation." 914 F. 2d, at 1315. The Ninth Circuit distinguished this Court's decision in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856), which it construed as permitting Congress to "*amend or repeal* any law, even for the purpose of ending pending litigation." 914 F. 2d, at 1315 (emphasis in original).

On remand, the plaintiffs renewed their original claims. In *Seattle Audubon*, the District Court enjoined under NFMA 16 timber sales offered by the Forest Service during fiscal year 1990 in order to meet its harvesting quota under § 318(a)(1). See *Seattle Audubon Soc.* v. *Robertson*, No. 89–160 (WD Wash., Dec. 18, 1990, and May 24, 1991). While the District Court proceedings were ongoing, the agencies jointly sought review of the Ninth Circuit's judgment that the first sentence of subsection (b)(6)(A) was unconstitutional. We granted certiorari, 501 U. S. 1249 (1991), and now reverse.[3]

II

The first sentence of subsection (b)(6)(A) provided that "management of areas according to subsections (b)(3) and (b)(5) . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for *[Seattle Audubon]* and *[Portland Audubon]*." The Ninth Circuit held that this language did not "amend" any previously existing "laws," but rather "direct[ed]" certain "factual findings" and "specific result[s]" under those laws. 914 F. 2d, at 1316. Petitioners interpret the provision differently. They argue that subsection (b)(6)(A) replaced the legal standards underlying the two original challenges with those set forth in subsections (b)(3) and (b)(5), without directing particular applications under either the old or the new standards. We agree.

We describe the operation of subsection (b)(6)(A) by example. The plaintiffs in both cases alleged violations of MBTA § 2, 16 U. S. C. § 703, which makes it unlawful to "kill" or "take" any "migratory bird." Before the Compromise was

[3] Because no timber sales offered by the BLM during fiscal year 1990 were ever enjoined, the § 318 controversy between Portland Audubon and the BLM appears moot. We decide the case, however, because there remains a live controversy between Seattle Audubon and the Forest Service over the 16 sales offered during fiscal year 1990 and still enjoined under the NFMA.

enacted, the courts adjudicating these MBTA claims were obliged to determine whether the challenged harvesting would "kill" or "take" any northern spotted owl, within the meaning of §2.[4] Subsection (b)(6)(A), however, raised the question whether the harvesting would violate different prohibitions—those described in subsections (b)(3) and (b)(5). If not, then the harvesting would constitute "management . . . according to" subsections (b)(3) and (b)(5), and would therefore be deemed to "mee[t]" MBTA §2 regardless of whether or not it would cause an otherwise prohibited killing or taking. Thus under subsection (b)(6)(A), the agencies could satisfy their MBTA obligations in either of two ways: by managing their lands so as neither to "kill" nor "take" any northern spotted owl within the meaning of §2, or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5). Subsection (b)(6)(A) operated identically as well upon all provisions of NEPA, NFMA, FLPMA, and OCLA that formed "the basis for" the original lawsuits.

We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law. Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of five old provisions. Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting violated neither of two new provisions. Its operation, we think, modified the old provisions. Moreover, we find nothing in subsection (b)(6)(A) that purported to direct any particular findings of fact or applications of law, old or new, to fact. For challenges to sales offered before or after fiscal year 1990, subsection (b)(6)(A) expressly reserved judgment upon "the legal and factual adequacy" of the administrative documents authorizing the sales. For challenges to sales offered during fiscal year 1990, subsection (g)(1) expressly provided

[4] The northern spotted owl is a "migratory bird" within the meaning of MBTA. See 50 CFR §10.13 (1991).

for *judicial* determination of the lawfulness of those sales. Section 318 did not instruct the courts whether any particular timber sales would violate subsections (b)(3) and (b)(5), just as the MBTA, for example, does not instruct the courts whether particular sales would "kill" or "take" any northern spotted owl. Indeed, § 318 *could not* instruct that any particular BLM timber sales were lawful under the new standards, because subsection (b)(5) incorporated by reference the harvesting prohibitions imposed by a BLM agreement not yet in existence when the Compromise was enacted. See n. 1, *supra*.

Respondents cite three textual features of subsection (b)(6)(A) in support of their conclusion that the provision failed to supply new law, but directed results under old law. First, they emphasize the imperative tone of the provision, by which Congress "determine[d] and direct[ed]" that compliance with two new provisions would constitute compliance with five old ones. Respondents argue that "Congress was directing the subsection [only] at the courts." Brief for Respondents Seattle Audubon Society et al. 34. Petitioners, for their part, construe the subsection as "a directive [only] to the Forest Service and BLM." Brief for Petitioners 30. We think that neither characterization is entirely correct. A statutory directive binds *both* the executive officials who administer the statute *and* the judges who apply it in particular cases—even if (as is usually the case) Congress fails to preface its directive with an empty phrase like "Congress . . . directs that." Here, we fail to see how inclusion of the "Congress . . . directs that" preface undermines our conclusion that what Congress directed—to agencies and courts alike—was a change in law, not specific results under old law.

Second, respondents argue that subsection (b)(6)(A) did not modify old requirements because it deemed compliance with new requirements to "mee[t]" the old requirements. We fail to appreciate the significance of this observation. Congress might have modified MBTA directly, for example,

in order to impose a new obligation of complying either with the current §2 or with subsections (b)(3) and (b)(5). Instead, Congress enacted an entirely separate statute deeming compliance with subsections (b)(3) and (b)(5) to constitute compliance with §2—a "modification" of the MBTA, we conclude, through operation of the canon that specific provisions qualify general ones, see, *e. g.*, *Simpson* v. *United States*, 435 U. S. 6, 15 (1978). As explained above, each formulation would have produced an identical task for a court adjudicating the MBTA claims—determining either that the challenged harvesting did not violate §2 as currently written or that it did not violate subsections (b)(3) and (b)(5).

Finally, respondents emphasize that subsection (b)(6)(A) explicitly made reference to pending cases identified by name and caption number. The reference to *Seattle Audubon* and *Portland Audubon*, however, served only to identify the five "statutory requirements that are the basis for" those cases—namely, pertinent provisions of MBTA, NEPA, NFMA, FLPMA, and OCLA. Subsection (b)(6)(A) named two pending cases in order to identify five statutory provisions. To the extent that subsection (b)(6)(A) affected the adjudication of the cases, it did so by effectively modifiying the provisions at issue in those cases.

In the alternative, the Ninth Circuit held that subsection (b)(6)(A) "could not" effect an implied modification of substantive law because it was embedded in an appropriations measure. See 914 F. 2d, at 1317. This reasoning contains several errors. First, although repeals by implication are especially disfavored in the appropriations context, see, *e. g.*, *TVA* v. *Hill*, 437 U. S. 153, 190 (1978), Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly. See, *e. g.*, *United States* v. *Will*, 449 U. S. 200, 222 (1980). Second, because subsection (b)(6)(A) provided *by its terms* that compliance with certain new law constituted compliance with certain old law, the intent to modify was not only clear, but express. Third,

having determined that subsection (b)(6)(A) would be unconstitutional unless it modified previously existing law, the court then became obliged to impose that "saving interpretation," 914 F. 2d, at 1317, as long as it was a "possible" one. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act").

We have no occasion to address any broad question of Article III jurisprudence. The Court of Appeals held that subsection (b)(6)(A) was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that subsection (b)(6)(A) *did* amend applicable law, we need not consider whether this reading of *Klein* is correct. The Court of Appeals stated additionally that a statute would be constitutional under *Wheeling Bridge* if it did amend law. Respondents' *amicus* Public Citizen challenges this proposition. It contends that even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases. This alternative theory was neither raised below nor squarely considered by the Court of Appeals; nor was it advanced by respondents in this Court. Accordingly, we decline to address it here. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES DEPARTMENT OF COMMERCE ET AL. *v.* MONTANA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

No. 91–860. Argued March 4, 1992—Decided March 31, 1992

Article I, § 2, of the Constitution requires apportionment of Representatives among the States "according to their respective Numbers." A 1941 federal statute provides that after each decennial census "the method known as the method of equal proportions" shall be used to determine the number of Representatives to which each State is entitled. Application of that method to the 1990 census caused Montana to lose one of its two seats in the House of Representatives. If it had retained both seats, each district would have been closer to the ideal size of a congressional district than the reapportioned single district. The State and several of its officials (hereinafter Montana) sued appropriate federal defendants (hereinafter the Government) in the District Court, alleging, *inter alia*, that the existing apportionment method violates Article I, § 2. A three-judge court, convened pursuant to 28 U. S. C. § 2284, granted Montana summary judgment on this claim, holding the statute unconstitutional because the variance between the single district's population and that of the ideal district could not be justified under the "one-person, one-vote" standard developed in *Wesberry* v. *Sanders*, 376 U. S. 1, and other intrastate districting cases.

Held: Congress exercised its apportionment authority within the limits dictated by the Constitution. Pp. 447–466.

(a) The general admonition in Article I, § 2, that apportionment be made "according to [the States'] respective numbers" is constrained by three constitutional requirements: the number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines. In light of those constraints and the problem of fractional remainders—*i. e.*, the fractional portion of the number that results when the State's total population is divided by the population of the ideal district must either be disregarded or treated as equal to one Representative because each State must be represented by a whole number of legislators—Congress has considered and either rejected or adopted various apportionment methods over the years, the most recent method tried being the method of equal proportions, also known as the "Hill Method." A National Academy of Sciences committee recommended that method as the fairest of the five

methods the committee felt could lead to a workable solution to the fractional remainder problem. If Congress had chosen the method of the harmonic mean, also known as the "Dean Method," Montana would have received a second seat after the 1990 census. Pp. 447–456.

(b) This Court rejects the Government's argument that Congress' selection of any of the alternative apportionment methods presents a "political question" that is not subject to judicial review under the standards set forth in *Baker* v. *Carr*, 369 U. S. 186, 217. Significantly, the Government does not suggest that all congressional decisions relating to apportionment are beyond judicial review, but merely argues that the District Court erred in concluding that the Constitution requires the greatest possible equality in the size of congressional districts, as measured by absolute deviation from ideal district size. Thus, the controversy here turns on the proper interpretation of the relevant constitutional provisions. As in *Baker* itself and the apportionment cases that followed, the political question doctrine does not place this kind of constitutional interpretation outside the proper domain of the Judiciary. Pp. 456–459.

(c) Congress had ample power to enact the statutory procedure at issue and to apply the Hill Method after the 1990 census. It is by no means clear that the facts here establish a violation of the *Wesberry* one-person, one-vote standard. Although Montana's evidence demonstrated that application of the Dean Method would decrease the absolute deviation from the ideal district size, it also would increase the relative difference between the ideal and the size of the districts both in Montana and in Washington, the only State that would have lost a Representative under the Dean Method. *Wesberry*'s polestar of equal representation does not provide sufficient guidance to determine what is the better measure of inequality. Moreover, while subsequent intrastate districting cases have interpreted the *Wesberry* standard as imposing a burden on the States to make a good-faith effort to achieve precise mathematical equality, that goal is rendered illusory for the Nation as a whole by the constraints imposed by Article I, § 2: the guarantee of a minimum of one Representative for each State and the need to allocate a fixed number of indivisible Representatives among 50 States of varying populations. The constitutional framework that generated the need for a compromise between the interests of larger and smaller States must also delegate to Congress a measure of discretion broader than that accorded to the States, and Congress' apparently good-faith decision to adopt the Hill Method commands far more deference, particularly as it was made after decades of experience, experimentation, and debate, was supported by independent scholars, and has been accepted for a half century. Pp. 459–466.

775 F. Supp. 1358, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Solicitor General Starr argued the cause for appellants. With him on the briefs were *Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Edwin S. Kneedler, Michael Jay Singer,* and *Mark B. Stern.*

Marc Racicot, Attorney General of Montana, argued the cause for appellees. With him on the brief were *Clay R. Smith,* Solicitor, and *Elizabeth S. Baker,* Assistant Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

Article I, §2, of the Constitution requires apportionment of Representatives among the several States "according to their respective Numbers."[1] An Act of Congress passed in 1941 provides that after each decennial census "the method known as the method of equal proportions" shall be used to determine the number of Representatives to which each State is entitled.[2] In this case a three-judge District Court

---

**Kenneth O. Eikenberry,* Attorney General of Washington, *James M. Johnson,* Senior Assistant Attorney General, and *Carole A. Ressler,* Assistant Attorney General, filed a brief for the State of Washington as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts by *Scott Harshbarger,* Attorney General, *Dwight Golann* and *Steve Berenson,* Assistant Attorneys General, and *John P. Driscoll, Jr., Edward P. Leibensperger,* and *Neil P. Motenko,* Special Assistant Attorneys General; and for the Crow Tribe of Indians et al. by *Dale T. White, Jeanne S. Whiteing,* and *Daniel F. Decker.*

[1] Article I, §2, originally provided that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

Section 2 of the Fourteenth Amendment modified this provision by establishing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

[2] 55 Stat. 761–762; 2 U. S. C. §2a(a).

held that statute unconstitutional because it found that the method of equal proportions resulted in an unjustified deviation from the ideal of equal representation.[3] The Government's appeal from that holding requires us to consider the standard that governs the apportionment of Representatives among the several States. In view of the importance of the issue and its significance in this year's congressional and Presidential elections, we noted probable jurisdiction and ordered expedited briefing and argument. 502 U. S. 1012 (1991). We now reverse.

I

The 1990 census revealed that the population of certain States, particularly California, Florida, and Texas, had increased more rapidly than the national average. The application of the method of equal proportions to the 1990 census caused 8 States to gain a total of 19 additional seats in the House of Representatives[4] and 13 States to lose an equal number.[5] Montana was one of those States. Its loss of one seat cut its delegation in half and precipitated this litigation.

According to the 1990 census, the population of the 50 States that elect the members of the House of Representatives is 249,022,783.[6] The average size of the 435 congressional districts is 572,466. Montana's population of 803,655 forms a single congressional district that is 231,189 persons larger than the ideal congressional district. If it had retained its two districts, each would have been 170,638 persons smaller than the ideal district. In terms of absolute

---

[3] 775 F. Supp. 1358, 1366 (Mont. 1991).

[4] Three States, California, Florida, and Texas, accounted for 14 of those gains; five States, Arizona, Georgia, North Carolina, Virginia, and Washington, each gained one seat. 2 App. 20.

[5] New York lost three seats; Illinois, Michigan, Ohio, and Pennsylvania each lost two seats; and Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Jersey, and West Virginia each lost one seat. *Ibid.*

[6] See *ibid.*

difference, each of the two districts would have been closer to ideal size than the single congressional district.

The State of Montana, its Governor, Attorney General, and Secretary of State,[7] and the State's two Senators and Representatives (hereinafter collectively referred to as Montana) filed suit against appropriate federal defendants (the Government) in the United States District Court for the District of Montana, asserting that Montana was entitled to retain its two seats. They alleged that the existing apportionment method violates Article I, § 2, of the Constitution because it "does not achieve the greatest possible equality in the number of individuals per representative"[8] and also violates Article I, § 2, and Article I, § 7, because reapportionment is effected "through application of a mathematical formula by the Department of Commerce and the automatic transmittal of the results to the states"[9] rather than by legislation on which Members of Congress vote in the normal manner. A three-judge District Court, convened pursuant to 28 U. S. C. § 2284, granted Montana's motion for summary judgment on the first claim.[10]

The majority of the three-judge District Court decided that the principle of equal representation for equal numbers of people that was applied to intrastate districting in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), should also be applied to the apportionment of seats among the States. Under that standard the only population variances that are acceptable are those that "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown," *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 531 (1969). The District Court held that the variance between

---

[7] The three state officials brought suit on behalf of all voters in Montana.

[8] Complaint ¶ 19.

[9] *Id.*, ¶¶ 28–29.

[10] Having granted summary judgment on the first claim, the District Court found it unnecessary to reach the merits of the claim relating to the automatic method of apportionment. 775 F. Supp., at 1366.

the population of Montana's single district and the ideal district could not be justified under that standard. The majority refused to accord deference to the congressional decision to adopt the method of equal proportions in 1941 because that decision was made without the benefit of this Court's later jurisprudence adopting the "one-person, one-vote" rule. Accordingly, the District Court entered a judgment declaring the statute void and enjoining the Government from effecting any reapportionment of the House of Representatives pursuant to the method of equal proportions.[11]

Circuit Judge O'Scannlain dissented. After noting that Congress has used four different apportionment formulas during the country's history, and that it is not possible to create 435 districts of equal size when each district must be located entirely within a single State, he concluded that the goal of any apportionment formula must be a "'practical approximation'" to a population-based allocation.[12] He analyzed the two formulae proposed by Montana and concluded that the State had failed to demonstrate that either was better than the one that had been chosen by Congress.[13]

II

The general admonition in Article I, § 2, that Representatives shall be apportioned among the several States "according to their respective Numbers" is constrained by three requirements. The number of Representatives shall not ex-

---

[11] *Ibid.*

[12] *Id.*, at 1369 (quoting 2 J. Story, Commentaries on the Constitution of the United States § 676 (1833)).

[13] Montana alleged that the "method of the harmonic mean" or the "method of smallest divisors" would yield a fairer result. Subsequent to the decision below, a District Court in Massachusetts rejected a challenge to Congress' adoption of the method of equal proportions. In that litigation, Massachusetts plaintiffs asserted that the superiority of another method, that of "major fractions," demonstrated that the method of equal proportions was unconstitutional. *Massachusetts* v. *Mosbacher*, Civ. Action No. 91–11234–WD (Mass., Feb. 20, 1992).

ceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines.[14] Although the text of Article I determined the original apportionment that the Framers had agreed upon,[15] it did not explain how that specific allocation had been made.

When Congress first confronted the task of apportionment after the census of 1790 (and after Vermont and Kentucky had been admitted to the Union), it considered using the constitutional minimum of 30,000 persons as the size of each district. Dividing that number into the total population of 3,615,920 indicated that the House of Representatives should contain 120 members. When the number 30,000 was divided into the population of individual States, each quotient was a whole number with a fractional remainder. Thus, the use of the 30,000 divisor for Connecticut's population of 236,841 indicated that it should have 7.89 Representatives, while Rhode Island, with a population of 68,446, should have 2.28 Representatives. Because each State must be represented by a whole number of legislators, it was necessary either to disregard fractional remainders entirely or to treat some or all of them as equal to a whole Representative.[16]

---

[14] The first and second requirements are set forth explicitly in Article I, § 2, of the Constitution. The requirement that districts not cross state borders appears to be implicit in the text and has been recognized by continuous historical practice. See 775 F. Supp., at 1365, n. 4; *id.*, at 1368 (O'Scannlain, J., dissenting).

[15] Section 2, cl. 3, required an enumeration of the population to be made within three years after the first meeting of Congress and provided that "until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

[16] See M. Balinski & H. Young, Fair Representation, Meeting the Ideal of One Man, One Vote 10–13 (1982) (hereinafter Balinski & Young).

In the first apportionment bill passed by Congress, an additional Representative was assigned to the nine States whose quotas had the highest fractional remainders. Thus, Connecticut's quota of 7.89 gave it 8 and Rhode Island's smaller remainder was disregarded, giving it only 2. Although that method was supported by Alexander Hamilton, Thomas Jefferson persuaded President Washington to veto the bill, in part because its allocation of eight Representatives to Connecticut exceeded the constitutional limit of one for every 30,000 persons.[17]

In response to that veto, Congress adopted a proposal sponsored by Thomas Jefferson that disregarded fractional remainders entirely (thus giving Connecticut only seven Representatives). To overcome the basis for the veto, the size of the House was reduced from 120 to 105 members, giving each Representative an approximate constituency of 33,000 instead of 30,000 persons. Although both the total number of Representatives and the size of their districts in-

---

[17] See *id.*, at 16–22. President Washington's veto message read as follows:

"*Gentlemen of the House of Representatives:*

"I have maturely considered the act passed by the two Houses entitled 'An act for an Apportionment of Representatives among the several States, according to the first Enumeration;' and I return it to your House, wherein it originated, with the following objections:

"First. The Constitution has prescribed that Representatives shall be apportioned among the several States according to their respective numbers; and there is no one proportion or divisor which, applied to the respective numbers of the States, will yield the number and allotment of Representatives proposed by the bill.

"Second. The Constitution has also provided that the number of Representatives shall not exceed one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the States; and the bill has allotted to eight of the States more than one for every thirty thousand,

"G. WASHINGTON"

3 Annals of Cong. 539 (1792).

creased,[18] Jefferson's method of disregarding fractional remainders was used after each of the next four censuses. Today mathematicians sometimes refer to that method as the "method of greatest divisors," and suggest that it tends to favor large States over smaller States.[19]

In 1832, Congress considered, but did not adopt, a proposal sponsored by John Quincy Adams that was the exact opposite of the Jefferson method. Instead of disregarding fractional remainders, Adams would have treated every fraction as a unit. Thus, using the former example as a hypothetical, both Connecticut and Rhode Island would have received one more Representative under the Adams method than they actually received under the Jefferson method. The Adams method is sometimes described as the "method of smallest divisors" and is said to favor the smaller States.[20] It has never been endorsed by Congress.

In 1842, Congress abandoned the Jefferson method in favor of an approach supported by Senator Daniel Webster. The Webster method took account of fractional remainders that were greater than one-half by allocating "one additional representative for each State having a fraction greater than one moiety."[21] Thus, if that method had been used in 1790, Connecticut's quota of 7.89 would have entitled it to 8 Representatives, whereas Rhode Island, with a quota of 2.28,

---

[18] The 1802 apportionment Act continued the ratio of 33,000, which then corresponded to a House of 141 Members. Act of Jan. 14, 1802, 2 Stat. 128. The third apportionment established a ratio of 35,000, which provided a House of 181 Members. Act of Dec. 21, 1811, 2 Stat. 669. The 1822 apportionment Act increased the ratio to 40,000 and the size of the House to 213. Act of Mar. 7, 1822, 3 Stat. 651. The 1832 apportionment Act provided for 240 districts representing an average of 47,700 persons each. Act of May 22, 1832, ch. 91, 4 Stat. 516. See generally L. Schmeckebier, Congressional Apportionment 111–113 (1941).

[19] See Balinski & Young 73–75.

[20] *Ibid.*

[21] Act of June 25, 1842, 5 Stat. 491.

would have received only 2. The Webster method is also described as the "method of major fractions."

In 1850, Congress enacted legislation sponsored by Representative Vinton endorsing the approach that had been sponsored by Alexander Hamilton after the first census.[22] Although this method was used during the balance of the 19th century, it occasionally seemed to produce paradoxical results.[23] Congress rejected it in 1911, reverting to the Webster method. In that year Congress also passed legislation that ultimately fixed the number of Representatives at 435.[24]

After the 1920 census Congress failed to pass a reapportionment Act, but debates over the proper method of apportionment ultimately led to a request to the National Academy of Sciences to appoint a committee of experts to review the subject. That committee, composed of respected mathematicians, recommended the adoption of the "method of equal proportions." Congress used that method in its ap-

---

[22] Act of May 23, 1850, §§ 24–26, 9 Stat. 432–433. Under the Hamilton/Vinton method, the Nation's population was divided by the size of the House (set at 233 in 1850) to determine the ratio of persons per Representative. This ratio was then divided into the population of a State to establish its quota. Each State would receive the number of Representatives corresponding to the whole number of the quota (ignoring the fractional remainders). The remaining seats necessary to bring the nationwide total to the proper size (233 in 1850) would then be distributed to the States with the largest fractional remainders. In practice, the method was not strictly followed. See Balinski & Young 37; Chafee, Congressional Reapportionment, 42 Harv. L. Rev. 1015, 1025 (1929).

[23] The Hamilton/Vinton method was subject to the "Alabama paradox," a mathematical phenomenon in which a State's number of Representatives may *decrease* when the size of the House is *increased*. See Balinski & Young 38–40; Chafee, Congressional Reapportionment, 42 Harv. L. Rev., at 1026.

[24] The 1911 statute actually specified 433 Representatives but authorized an additional Representative for Arizona and New Mexico when they were admitted to the Union. See 37 Stat. 13. Additional Representatives were also authorized when Alaska and Hawaii were admitted to the Union in 1959, but the number thereafter reverted to 435, where it has remained ever since. See 72 Stat. 345; 73 Stat. 8.

portionment after the 1930 census, and formally adopted it in the 1941 statute at issue in this case.[25]

The report of the National Academy of Sciences committee noted that Congress had properly rejected the Hamilton/Vinton method, and concluded that the use of only five methods could lead to a workable solution of the fractional remainder problem.[26] In the opinion of the committee mem-

---

[25] Act of Nov. 15, 1941, § 1, 55 Stat. 761–762, 2 U. S. C. § 2a. That Act also made the reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census:

"(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

"(b) . . . It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section."

[26] The five were the "method of smallest divisors," the "method of the harmonic mean," the "method of equal proportions," the "method of major fractions," and the "method of greatest divisors." 1 App. 17.

Each of the methods corresponds to a different formula for producing a "priority list." A priority list is the mechanical method used in modern apportionments to translate a particular method of apportionment into a particular assignment of Representatives. The technical process of forming the priority list proceeds as follows. First, one Representative is assigned to each State to satisfy the constitutional guarantee. Second, the population of each State is divided by a certain tabulated series of divisors. Third, the quotients for all the States are arranged in a single series in order of size, beginning with the largest quotient, for the 51st Member of the House. This forms the priority list. The series of quotients is different for each of the five apportionment methods. See Chafee, Congressional Reapportionment, 42 Harv. L. Rev., at 1029, n. 39.

The following are the divisors by which a State's population is divided under each method ("n" is the number of the State's next seat):

bers, given the fact that it is impossible for all States to have districts of the same size, the best method was the one that minimized the discrepancy between the size of the dis-

---

Smallest Divisors: $n-1$
Harmonic Mean: $\frac{2(n-1)n}{(n-1)+n}$
Equal Proportions: $\sqrt{n(n-1)}$
Major Fractions: $n-\frac{1}{2}$
Greatest Divisors: n

Thus, the divisors for the second, third, fourth, and fifth Representative of a State are as follows:

Smallest Divisors: 1, 2, 3, 4
Harmonic Mean: $\frac{2\times2}{3}, \frac{4\times3}{5}, \frac{6\times4}{7}, \frac{8\times5}{9}$
Equal Proportions: $\sqrt{2\times1}, \sqrt{3\times2}, \sqrt{4\times3}, \sqrt{5\times4}$
Major Fractions: $\frac{3}{2}, \frac{5}{2}, \frac{7}{2}, \frac{9}{2}$
Greatest Divisors: 2, 3, 4, 5

See *ibid.* For example, the 1990 census indicated that the most populous States were California and New York. California had a population of 29,839,250, and New York had a population of 18,044,505. See 2 App. 20. Under the method of smallest divisors, the quotients are:

	second seat (divisor: $n-1=1$)	*third seat (divisor: $n-1=2$)*
California	29,839,250	14,919,625
New York	18,044,505	9,022,252

See 2 App. 53. Under the method of greatest divisors, the quotients are:

	second seat (divisor: $n=2$)	*third seat (divisor: $n=3$)*
California	14,919,625	9,946,417
New York	9,022,252	6,014,835

Under any method, the first 50 seats are assigned one to each State. If the method of smallest divisors is employed, the 51st seat is assigned to California, and the 52d seat is assigned to New York. Under the method of greatest divisors, however, California is assigned both the 51st and the 52d seats because the quotient for its third seat is 9,946,417, which is higher than the quotient for New York's second seat, which is 9,022,252.

tricts in any pair of States. Under their test of fairness, a method was satisfactory if, for any pair of States, the transfer of one Representative would not decrease the discrepancy between those States' districts.[27] The choice of a method depended on how one decided to measure the discrepancy between district sizes. Each of the five methods could be described as the "best" in the sense of minimizing the discrepancy between districts, depending on the discrepancy measure selected. The method of the harmonic mean, for example, yielded the fairest apportionment if the discrepancy was measured by the absolute difference between the number of persons per Representative. The method of major fractions was the best method if the discrepancy was measured by the absolute difference between the number of Representatives per person (also known as each person's "share" of a Representative).[28] The method of equal proportions produced the fairest apportionment if the discrepancy

---

[27] The committee explained the test as follows:

"Let the population of a State be A and the number of Representatives assigned to it according to a selected method of apportionment be a, and let B and b represent the corresponding numbers for a second State. Under an ideal apportionment the population A/a, B/b of the congressional districts in the two States should be equal, as well as the numbers a/A, b/B, of Representatives per person in each State. In practice it is impossible to bring this desirable result about for all pairs of States.

"In the opinion of the committee the best test of a desirable apportionment so far proposed is the following:

"An apportionment of Representatives to various States, when the total number of Representatives is fixed, is mathematically satisfactory if for every pair of States the discrepancy between the numbers A/a and B/b cannot be decreased by assigning one or more Representative to the State A and one fewer to the State B, or vice versa, or if the two numbers a/A and b/B have the same property." 1 App. 18.

[28] A person's "share" of a Representative is the reciprocal of the population of a person's district. For example, in an ideal district under the 1990 census, each person has a share of 1/572,466 of a Representative.

was measured by the "relative difference" [29] in either the size of the district or the share of a Representative.[30]

The report concluded by endorsing the method of equal proportions. The committee apparently preferred this method for two reasons. First, the method of equal proportions minimized the relative difference both between the size of congressional districts and between the number of Representatives per person. Second, in comparison with the other four methods considered, this method occupied an intermediate position in terms of favoring small States over large States: It favored small States more than major fractions and greatest divisors, but not as much as smallest divisors or the harmonic mean.[31]

If either the method of smallest divisors or the method of the harmonic mean, also known as the "Dean Method," had been used after the 1990 census, Montana would have received a second seat. Under the method of equal proportions, which was actually used, five other States had stronger claims to an additional seat because Montana's claim to a second seat was the 441st on the equal proportions "priority list," see n. 26, *supra*.[32] Montana would not have received

---

[29] "The relative difference between two numbers consists of subtracting the smaller number from the larger number and then dividing the result by the smaller number." 1 App. 24 (Ernst Declaration).

[30] See *ibid.*

[31] See *id.*, at 19. The committee considered only the extent to which each method favored the small or large States in comparison to the other methods. The committee did not attempt to determine absolute bias. Some scholars have asserted that in absolute terms, the method of equal proportions favors small States over large States and that the method of major fractions is the method with the least inherent bias between small and large States. See Balinski & Young 72–78. That contention has been disputed. See *Massachusetts* v. *Mosbacher*, Civ. Action No. 91–11234–WD (Mass., Feb. 20, 1992), p. 57.

[32] 2 App. 35.

a second seat under either the method of major fractions or greatest divisors.

III

The Government argues that Congress' selection of any of the alternative apportionment methods involved in this litigation is not subject to judicial review. Relying principally on *Baker* v. *Carr*, 369 U. S. 186 (1962), the Government contends that the choice among these methods presents a "political question" not amenable to judicial resolution.

In *Baker* v. *Carr*, after an extensive review of our prior cases involving political questions, we concluded:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as

to whether some action denominated 'political' exceeds constitutional authority." *Id.*, at 217.

The Government insists that each of the factors identified in *Baker* supports the conclusion that the question presented here is committed to the "political branches" to the exclusion of the Judiciary. Significantly, however, the Government does not suggest that all congressional decisions relating to apportionment are beyond judicial review. The Government does not, for instance, dispute that a court could set aside an apportionment plan that violated the constitutional requirement that "[t]he number of Representatives shall not exceed one for every thirty Thousand."[33] Further, with respect to the provision that Representatives "shall be apportioned among the several States . . . according to their respective Numbers,"[34] the Government acknowledges that Congress has a judicially enforceable obligation to select an apportionment plan that is related to population.[35] The gravamen of the Government's argument is that the District Court erred in concluding that the Constitution imposes the more rigorous requirement of greatest possible equality in the size of congressional districts, as measured by absolute deviation from ideal district size. The Government then does not dispute Montana's contention that the Constitution places substantive limitations on Congress' apportionment power and that violations of those limitations would present a justiciable controversy. Where the parties differ is in their understanding of the content of these limitations. In short, the Government takes issue not with the existence of a judicially enforceable right, but with the definition of such a right.

When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of

---

[33] U. S. Const., Art. I, § 2, cl. 3.

[34] *Ibid.*

[35] See Brief for United States 24–34; Tr. of Oral Arg. 10–13.

that issue. See *Gilligan* v. *Morgan*, 413 U. S. 1, 10–12 (1973); *Baker* v. *Carr*, 369 U. S., at 197; see also *Colegrove* v. *Green*, 328 U. S. 549, 552–556 (1946) (plurality opinion). In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable.[36] Such a decision is of course very different from determining that specific congressional action does not violate the Constitution.[37] That determination is a decision on the merits that reflects the *exercise* of judicial review, rather than the *abstention* from judicial review that would be appropriate in the case of a true political question.

The case before us today is "political" in the same sense that *Baker* v. *Carr* was a "political case." 369 U. S., at 217. It raises an issue of great importance to the political branches.[38] The issue has motivated partisan and sectional debate during important portions of our history. Nevertheless, the reasons that supported the justiciability of challenges to state legislative districts, as in *Baker* v. *Carr*, as well as state districting decisions relating to the election of Members of Congress, see, *e. g.*, *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Karcher* v. *Daggett*, 462 U. S. 725 (1983), apply with equal force to the issues presented by this litigation. The controversy between Montana and the Government turns on the proper interpretation of the relevant constitutional provisions. As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary. See

---

[36] See Henkin, Is There a "Political Question" Doctrine?, 85 Yale L. J. 597, 599 (1976).

[37] See M. Redish, The Federal Courts in the Political Order 116–117 (1991).

[38] Not only is the composition of the House of Representatives implicated by the case, but also the composition of the electoral college that elects the President. That college includes representation from each State equivalent to the sum of its Senators and Representatives. U. S. Const., Art. II, § 1, cl. 2.

Davis v. *Bandemer*, 478 U. S. 109, 123 (1986); *Baker* v. *Carr*, 369 U. S., at 234–237; cf. *Gilligan* v. *Morgan*, 413 U. S., at 11. The political question doctrine presents no bar to our reaching the merits of this dispute and deciding whether the District Court correctly construed the constitutional provisions at issue.

Our previous apportionment cases concerned States' decisions creating legislative districts; today we review the actions of Congress. Respect for a coordinate branch of Government raises special concerns not present in our prior cases, but those concerns relate to the merits of the controversy rather than to our power to resolve it. As the issue is properly raised in a case otherwise unquestionably within our jurisdiction, we must determine whether Congress exercised its apportionment authority within the limits dictated by the Constitution. See *INS* v. *Chadha*, 462 U. S. 919, 940–941 (1983); *Powell* v. *McCormack*, 395 U. S. 486, 521 (1969). Without the need for another exploration of the *Baker* factors, it suffices to say that, as in *Baker* itself and the apportionment cases that followed, the political question doctrine does not place this kind of constitutional interpretation outside the proper domain of the Judiciary.

IV

In *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), the Court considered the claim of voters in Fulton County, Georgia, that the disparity between the size of their congressional district (823,680) and the average size of the 10 districts in Georgia (394,312) deprived them of the right "to have their votes for Congressmen given the same weight as the votes of other Georgians." *Id.*, at 3. This Court upheld the claim, concluding that Article I, § 2, had established a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." 376 U. S., at 18. The constitutional command that Representatives be chosen "by the People of the several

States" meant that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.*, at 7–8. Writing for the Court, Justice Black explained:

> "It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter." *Id.*, at 14.

In subsequent cases, the Court interpreted that standard as imposing a burden on the States to "make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick* v. *Preisler*, 394 U. S., at 530–531; see also *Karcher* v. *Daggett*, 462 U. S., at 730.

Our cases applying the *Wesberry* standard have all involved disparities in the size of voting districts within the same State. In this case, however, Montana contends, and a majority of the District Court agreed, that the *Wesberry* standard also applies to apportionment decisions made by Congress and that it was violated because of an unjustified variance between the population of Montana's single district and the ideal district size.

Montana's evidence demonstrated that if Congress had used the method of the harmonic mean, sometimes referred to as the "Dean Method," instead of the method of equal proportions, sometimes called the "Hill Method," to apportion the districts, 48 of the States would have received the same number of Representatives, while Washington would have received one less—eight instead of nine—and Montana would have received one more. Under an apportionment undertaken according to the Hill Method, the absolute differ-

ence between the population of Montana's single district (803,655) and the ideal (572,466) is 231,189; the difference between the average Washington district (543,105) and the ideal is 29,361. Hence, the sum of the differences between the average and the ideal district size in the two States is 260,550. Under the Dean Method, Montana would have two districts with an average population of 401,838, representing a deviation from the ideal of 170,638; Washington would then have eight districts averaging 610,993, which is a deviation of 38,527 from the ideal district size. The sum of the deviations from the ideal in the two States would thus be 209,165 under the Dean Method (harmonic mean), while it is 260,550 under the Hill Method (equal proportions). More generally, Montana emphasizes that the Dean Method is the best method for minimizing the absolute deviations from ideal district size.

There is some force to the argument that the same historical insights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States "according to their respective Numbers" would also embody the same principle of equality. Yet it is by no means clear that the facts here establish a violation of the *Wesberry* standard. In cases involving variances within a State, changes in the absolute differences from the ideal produce parallel changes in the relative differences. Within a State, there is no theoretical incompatibility entailed in minimizing both the absolute and the relative differences. In this case, in contrast, the reduction in the absolute difference between the size of Montana's district and the size of the ideal district has the

effect of increasing the variance in the *relative* difference[39] between the ideal and the size of the districts in both Montana and Washington.[40] Moreover, whereas reductions in the variances among districts within a given State bring all of the affected districts closer to the ideal, in this case a change that would bring Montana closer to the ideal pushes the Washington districts away from that ideal.[41]

---

[39] See n. 29, *supra.*

[40] Under the Hill Method (equal proportions), the relative differences between Montana's and Washington's districts and the ideal, respectively, are 40.4% and 5.4%; under the Dean Method (harmonic mean), they are 42.5% and 6.7%. See 1 App. 27.

The absolute and relative differences between the actual average district size and the ideal district size in an apportionment using the Hill Method (Montana has one Representative, and Washington has nine Representatives) are as follows:

	Average District Size	*Absolute Difference From Ideal*	*Relative Difference From Ideal*
Montana	803,655	231,189	40.4%
Washington	543,105	29,361	5.4%
Total Absolute Difference		260,550	

The absolute and relative differences between the actual average district size and the ideal district size in an apportionment using the Dean Method (Montana has two Representatives, and Washington has eight Representatives) are as follows:

	Average District Size	*Absolute Difference From Ideal*	*Relative Difference From Ideal*
Montana	401,828	170,638	42.5%
Washington	610,993	38,527	6.7%
Total Absolute Difference		209,165	

The relative difference from the ideal is less both for Montana and for Washington in a Hill apportionment; the total absolute difference from the ideal is less in a Dean apportionment.

[41] Indeed, as Washington has more districts than Montana, it could be argued that deviation from ideal district size in Washington represents a more significant departure from the goal of equal representation than does a similar deviation in Montana. In his dissent in the District Court, Judge O'Scannlain noted the potential importance of taking account of the

What is the better measure of inequality—absolute difference in district size, absolute difference in share of a Representative, or relative difference in district size or share? Neither mathematical analysis nor constitutional interpretation provides a conclusive answer. In none of these alternative measures of inequality do we find a substantive principle of commanding constitutional significance. The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course.

A State's compliance with *Wesberry*'s "high standard of justice and common sense" begins with a good-faith effort to produce complete equality for each voter. As our cases involving variances of only a fraction of one percent demonstrate, that goal is realistic and appropriate for state districting decisions. See *Karcher* v. *Daggett*, 462 U. S., at 730–743. In this case, however, whether Montana has one district or two, its variance from the ideal will exceed 40 percent.

The constitutional guarantee of a minimum of one Representative for each State inexorably compels a significant departure from the ideal. In Alaska, Vermont, and Wyoming, where the statewide districts are less populous than the ideal district, every vote is more valuable than the national average. Moreover, the need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50. Accordingly, although "common sense" supports a test requiring "a good-faith effort to achieve precise mathematical equality" *within* each State, *Kirkpatrick* v. *Preisler*, 394 U. S., at 530–531, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.

---

number of districts in a State, rather than merely the average size of a district. See 775 F. Supp., at 1371.

This commonsense understanding of a characteristic of our Federal Government must have been obvious to the masters of compromise who framed our Constitution. The spirit of compromise that provided two Senators for every State and Representatives of the People "according to their respective Numbers" in the House must also have motivated the original allocation of Representatives specified in Article I, § 2, itself. Today, as then, some compromise between the interests of larger and smaller States must be made to achieve a fair apportionment for the entire country.

The constitutional framework that generated the need for compromise in the apportionment process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders. Article I, § 8, cl. 18, expressly authorizes Congress to enact legislation that "shall be necessary and proper" to carry out its delegated responsibilities. Its apparently good-faith choice of a method of apportionment of Representatives among the several States "according to their respective Numbers" commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard.[42]

---

[42] Some evidence suggests that partisan political concerns may have influenced Congress' initial decision to adopt the equal proportions method in 1941. The choice of this method resulted in the assignment of an additional seat to Arkansas, a Democratic State, rather than to Michigan, a State with more Republican leanings. The vote to adopt equal proportions was along party lines (except for the Democrats from Michigan, who opposed the bill). See Balinski & Young 57–58; see also 775 F. Supp., at 1365. Nevertheless, although Congress has considered the apportionment problem periodically since 1941, it has not altered that initial choice. See *Massachusetts* v. *Mosbacher*, Civ. Action No. 91–11234–WD (Mass., Feb. 20, 1992), pp. 40–42. Montana does not contend that the equal proportions method systematically favors a particular party, nor that its retention over a 50-year period reflects efforts to maintain partisan political advantage.

The District Court suggested that the automatic character[43] of the application of the method of equal proportions was inconsistent with Congress' responsibility to make a fresh legislative decision after each census.[44] We find no merit in this suggestion. Indeed, if a set formula is otherwise constitutional, it seems to us that the use of a procedure that is administered efficiently and that avoids partisan controversy supports the legitimacy of congressional action, rather than undermining it. To the extent that the potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served, provided, of course, that any such rule remains open to challenge or change at any time. We see no constitutional obstacle preventing Congress from adopting such a sensible procedure.

The decision to adopt the method of equal proportions was made by Congress after decades of experience, experimentation, and debate about the substance of the constitutional requirement. Independent scholars supported both the basic decision to adopt a regular procedure to be followed after each census and the particular decision to use the method of equal proportions.[45] For a half century the results of that method have been accepted by the States and

---

[43] See n. 25, *supra*.

[44] See 775 F. Supp., at 1366.

[45] In his article Congressional Reapportionment, written in 1929, Zechariah Chafee, Jr., wrote:

"[B]oth mathematical and political reasons point to the Method of Equal Proportions as the best plan for a just apportionment. . . . Congress has power to delegate the task to the president or other high official, if the size of the House and the method be definitely indicated. . . . It is very desirable that this permanent plan should embody the best method now known, so that it may operate for many decades without constant demands for revision. Congress will then no longer need to engage in prolonged debates and committee hearings every ten years. Reapportionment will be taken out of politics." 42 Harv. L. Rev., at 1047.

the Nation. That history supports our conclusion that Congress had ample power to enact the statutory procedure in 1941 and to apply the method of equal proportions after the 1990 census.

The judgment of the District Court is reversed.

It is so ordered.

Syllabus

FREEMAN ET AL. *v.* PITTS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89–1290. Argued October 7, 1991—Decided March 31, 1992

In a class action filed by respondents, black schoolchildren and their parents, the District Court, in 1969, entered a consent order approving a plan to dismantle the *de jure* segregation that had existed in the DeKalb County, Georgia, School System (DCSS). The court retained jurisdiction to oversee implementation of the plan. In 1986, petitioner DCSS officials filed a motion for final dismissal of the litigation, seeking a declaration that DCSS had achieved unitary status. Among other things, the court found that DCSS "has travelled the . . . road to unitary status almost to its end," noted that it had "continually been impressed by [DCSS'] successes . . . and its dedication to providing a quality education for all," and ruled that DCSS is a unitary system with regard to four of the six factors identified in *Green* v. *School Bd. of New Kent County,* 391 U. S. 430: student assignments, transportation, physical facilities, and extracurricular activities. In particular, the court found with respect to student assignments that DCSS had briefly achieved unitary status under the court-ordered plan, that subsequent and continuing racial imbalance in this category was a product of independent demographic changes that were unrelated to petitioners' actions and were not a vestige of the prior *de jure* system, and that actions taken by DCSS had achieved maximum practical desegregation from 1969 to 1986. Although ruling that it would order no further relief in the foregoing areas, the court refused to dismiss the case because it found that DCSS was not unitary with respect to the remaining *Green* factors: faculty assignments and resource allocation, the latter of which the court considered in connection with a non-*Green* factor, the quality of education being offered to the white and black student populations. The court ordered DCSS to take measures to address the remaining problems. The Court of Appeals reversed, holding, *inter alia,* that a district court should retain full remedial authority over a school system until it achieves unitary status in all *Green* categories at the same time for several years; that because, under this test, DCSS had never achieved unitary status, it could not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status; and that DCSS would have to take further actions to correct the racial imbalance, even though such actions might be "administratively awkward,

inconvenient, and even bizarre in some situations," *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 28.

Held:

1. In the course of supervising a desegregation plan, a district court has the authority to relinquish supervision and control of a school district in incremental stages, before full compliance has been achieved in every area of school operations, and may, while retaining jurisdiction over the case, determine that it will not order further remedies in areas where the school district is in compliance with the decree. Pp. 485–492.

(a) *Green* held that the duty of a former *de jure* district is to take all necessary steps to convert to a unitary system in which racial discrimination is eliminated, set forth factors that measure unitariness, and instructed the district courts to fashion remedies that address all these factors. Although the unitariness concept is helpful in defining the scope of the district court's authority, the term "unitary" does not have a fixed meaning or content and does not confine the court's discretion in a way that departs from traditional equitable principles. Under such principles, a court has the inherent capacity to adjust remedies in a feasible and practical way to correct the constitutional violation, *Swann*, *supra*, at 15–16, with the end purpose of restoring state and local authorities to the control of a school system that is operating in compliance, see, *e. g.*, *Milliken* v. *Bradley*, 433 U. S. 267, 280–281. Where justified by the facts of the case, incremental or partial withdrawal of judicial supervision and control in areas of compliance, and retention of jurisdiction over the case with continuing supervision in areas of noncompliance, provides an orderly means for fulfilling this purpose. In particular, the court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations. See *Pasadena Bd. of Education* v. *Spangler*, 427 U. S. 424, 436. Pp. 485–491.

(b) Among the factors which must inform the court's discretion to order the incremental withdrawal of its supervision in an equitable manner are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of control is necessary or practicable to achieve compliance in other areas; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the decree and to those statutory and constitutional provisions that were the predicate for judicial intervention in the first instance. In considering these factors a court should give particular attention to the school system's record of compliance; *i. e.*, whether its policies form a consistent

pattern of lawful conduct directed to eliminating earlier violations. And with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision. Pp. 491–492.

2. The Court of Appeals erred in holding that, as a matter of law, the District Court had no discretion to permit DCSS to regain control over student assignments and three other *Green* factors, while retaining supervision over faculty assignments and the quality of education. Pp. 492–500.

(a) The District Court exercised its discretion appropriately in addressing the *Green* elements, inquiring into quality of education, and determining whether minority students were being disadvantaged in ways that required the formulation of new and further remedies in areas of noncompliance. This approach illustrates that the *Green* factors need not be a rigid framework and demonstrates the proper use of equitable discretion. By withdrawing control over areas where judicial supervision is no longer needed, a district court can concentrate its own and the school district's resources on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary. Pp. 492–493.

(b) The related premises underlying the Court of Appeals' rejection of the District Court's order—first, that given noncompliance in some discrete categories, there can be no partial withdrawal of judicial control; and second, until there is full compliance, *Swann*, *supra*, requires that heroic measures be taken to ensure racial balance in student assignments system wide—are incorrect under this Court's analysis and precedents. Racial balance is not to be achieved for its own sake, but is to be pursued only when there is a causal link between an imbalance and the constitutional violation. Once racial imbalance traceable to the constitutional violation has been remedied, a school district is under no duty to remedy an imbalance that is caused by demographic factors. *Id.*, at 31–32. The decree here accomplished its objective of desegregation in student assignments in the first year of its operation, and the District Court's finding that the subsequent resegregation is attributable to independent demographic forces is credible. A proper rule must be based on the necessity to find a feasible remedy that ensures system-wide compliance with the decree and that is directed to curing the effect of the specific violation. Pp. 493–497.

(c) Resolution of the question whether retention of judicial control over student attendance is necessary or practicable to achieve compliance in other facets of DCSS must await further proceedings on remand. The District Court did not have this Court's analysis before it when

Syllabus

it addressed the faculty assignment problem, and specific findings and conclusions should be made on whether student reassignments would be a proper way to remedy the defect. Moreover, the District Court's praise for DCSS' successes, dedication, and progress, and its failure to find that DCSS had acted in bad faith or engaged in postdecree acts of discrimination with respect to those areas where compliance had not been achieved, may not be the equivalent of the necessary finding that DCSS has an affirmative commitment to comply in good faith with the entirety of the desegregation plan. Pp. 497–500.

887 F. 2d 1438, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and SOUTER, JJ., joined. SCALIA, J., *post*, p. 500, and SOUTER, J., *post*, p. 507, filed concurring opinions. BLACKMUN, J., filed an opinion concurring in the judgment, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 509. THOMAS, J., took no part in the consideration or decision of the case.

Rex E. Lee argued the cause for petitioners. With him on the briefs were *Carter G. Phillips, Mark D. Hopson, Gary M. Sams, Charles L. Weatherly,* and *J. Stanley Hawkins.*

Solicitor General Starr argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Assistant Attorney General Dunne, Deputy Solicitor General Roberts, Deputy Assistant Attorney General Clegg, Ronald J. Mann, David K. Flynn,* and *Lisa J. Stark.*

Christopher A. Hansen argued the cause for respondents. With him on the brief were *Steven R. Shapiro, Helen Hershkoff, John A. Powell,* and *Willie Abrams.**

---

*Briefs of *amici curiae* urging reversal were filed for the Intervenors in *Carlin* v. *Board of Education San Diego Unified School District* by *Elmer Enstrom, Jr.;* and for the Southeastern Legal Foundation, Inc., by *G. Stephen Parker.*

Briefs of *amici curiae* urging affirmance were filed for the Lawyers' Committee for Civil Rights Under Law by *Norman Redlich* and *Burke Marshall;* and for the NAACP, DeKalb County, Georgia, Branch et al. by *William H. Allen* and *Elliott Schulder.*

Charles S. Johnson III filed a brief for plaintiff-intervenors as *amici curiae.*

JUSTICE KENNEDY delivered the opinion of the Court.

DeKalb County, Georgia, is a major suburban area of Atlanta. This case involves a court-ordered desegregation decree for the DeKalb County School System (DCSS). DCSS now serves some 73,000 students in kindergarten through high school and is the 32d largest elementary and secondary school system in the Nation.

DCSS has been subject to the supervision and jurisdiction of the United States District Court for the Northern District of Georgia since 1969, when it was ordered to dismantle its dual school system. In 1986, petitioners filed a motion for final dismissal. The District Court ruled that DCSS had not achieved unitary status in all respects but had done so in student attendance and three other categories. In its order the District Court relinquished remedial control as to those aspects of the system in which unitary status had been achieved, and retained supervisory authority only for those aspects of the school system in which the district was not in full compliance. The Court of Appeals for the Eleventh Circuit reversed, 887 F. 2d 1438 (1989), holding that a district court should retain full remedial authority over a school system until it achieves unitary status in six categories at the same time for several years. We now reverse the judgment of the Court of Appeals and remand, holding that a district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan. A district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system.

I

A

For decades before our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*, and our mandate in

Brown v. *Board of Education*, 349 U. S. 294, 301 (1955) *(Brown II)*, which ordered school districts to desegregate with "all deliberate speed," DCSS was segregated by law. DCSS' initial response to the mandate of *Brown II* was an all too familiar one. Interpreting "all deliberate speed" as giving latitude to delay steps to desegregate, DCSS took no positive action toward desegregation until the 1966–1967 school year, when it did nothing more than adopt a freedom of choice transfer plan. Some black students chose to attend former *de jure* white schools, but the plan had no significant effect on the former *de jure* black schools.

In 1968, we decided *Green* v. *School Bd. of New Kent County*, 391 U. S. 430. We held that adoption of a freedom of choice plan does not, by itself, satisfy a school district's mandatory responsibility to eliminate all vestiges of a dual system. *Green* was a turning point in our law in a further respect. Concerned by more than a decade of inaction, we stated that "'[t]he time for mere "deliberate speed" has run out.'" *Id.*, at 438, quoting *Griffin* v. *Prince Edward County School Bd.*, 377 U. S. 218, 234 (1964). We said that the obligation of school districts once segregated by law was to come forward with a plan that "promises realistically to work, and promises realistically to work *now*." 391 U. S., at 439 (emphasis in original). The case before us requires an understanding and assessment of how DCSS responded to the directives set forth in *Green*.

Within two months of our ruling in *Green*, respondents, who are black schoolchildren and their parents, instituted this class action in the United States District Court for the Northern District of Georgia. After the suit was filed, DCSS voluntarily began working with the Department of Health, Education, and Welfare to devise a comprehensive and final plan of desegregation. The District Court, in June 1969, entered a consent order approving the proposed plan, which was to be implemented in the 1969–1970 school year. The order abolished the freedom of choice plan and adopted

a neighborhood school attendance plan that had been proposed by DCSS and accepted by the Department of Health, Education, and Welfare subject to a minor modification. Under the plan all of the former *de jure* black schools were closed, and their students were reassigned among the remaining neighborhood schools. The District Court retained jurisdiction.

Between 1969 and 1986, respondents sought only infrequent and limited judicial intervention into the affairs of DCSS. They did not request significant changes in student attendance zones or student assignment policies. In 1976, DCSS was ordered to expand its Majority-to-Minority (M-to-M) student transfer program, allowing students in a school where they are in the majority race to transfer to a school where they are in the minority; to establish a biracial committee to oversee the transfer program and future boundary line changes; and to reassign teachers so that the ratio of black to white teachers in each school would be, in substance, similar to the racial balance in the school population systemwide. From 1977 to 1979, the District Court approved a boundary line change for one elementary school attendance zone and rejected DCSS proposals to restrict the M-to-M transfer program. In 1983, DCSS was ordered to make further adjustments to the M-to-M transfer program.

In 1986, petitioners filed a motion for final dismissal of the litigation. They sought a declaration that DCSS had satisfied its duty to eliminate the dual education system, that is to say a declaration that the school system had achieved unitary status. *Green, supra,* at 441. The District Court approached the question whether DCSS had achieved unitary status by asking whether DCSS was unitary with respect to each of the factors identified in *Green.* The court considered an additional factor that is not named in *Green:* the quality of education being offered to the white and black student populations.

The District Court found DCSS to be "an innovative school system that has travelled the often long road to unitary status almost to its end," noting that "the court has continually been impressed by the successes of the DCSS and its dedication to providing a quality education for all students within that system." App. to Pet. for Cert. 71a. It found that DCSS is a unitary system with regard to student assignments, transportation, physical facilities, and extracurricular activities, and ruled that it would order no further relief in those areas. The District Court stopped short of dismissing the case, however, because it found that DCSS was not unitary in every respect. The court said that vestiges of the dual system remain in the areas of teacher and principal assignments, resource allocation, and quality of education. DCSS was ordered to take measures to address the remaining problems.

B

Proper resolution of any desegregation case turns on a careful assessment of its facts. *Green, supra,* at 439. Here, as in most cases where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole. This inquiry is fundamental, for under the former *de jure* regimes racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race. In accord with this principle, the District Court began its analysis with an assessment of the current racial mix in the schools throughout DCSS and the explanation for the racial imbalance it found. Respondents did not contend on appeal that the findings of fact were clearly erroneous, and the Court of Appeals did not find them to be erroneous. The Court of Appeals did disagree with the conclusion reached

by the District Court respecting the need for further supervision of racial balance in student assignments.

In the extensive record that comprises this case, one fact predominates: Remarkable changes in the racial composition of the county presented DCSS and the District Court with a student population in 1986 far different from the one they set out to integrate in 1969. Between 1950 and 1985, DeKalb County grew from 70,000 to 450,000 in total population, but most of the gross increase in student enrollment had occurred by 1969, the relevant starting date for our purposes. Although the public school population experienced only modest changes between 1969 and 1986 (remaining in the low 70,000's), a striking change occurred in the racial proportions of the student population. The school system that the District Court ordered desegregated in 1969 had 5.6% black students; by 1986 the percentage of black students was 47%.

To compound the difficulty of working with these radical demographic changes, the northern and southern parts of the county experienced much different growth patterns. The District Court found that "[a]s the result of these demographic shifts, the population of the northern half of DeKalb County is now predominantly white and the southern half of DeKalb County is predominantly black." App. to Pet. for Cert. 38a. In 1970, there were 7,615 nonwhites living in the northern part of DeKalb County and 11,508 nonwhites in the southern part of the county. By 1980, there were 15,365 nonwhites living in the northern part of the county, and 87,583 nonwhites in the southern part. Most of the growth in the nonwhite population in the southern portion of the county was due to the migration of black persons from the city of Atlanta. Between 1975 and 1980 alone, approximately 64,000 black citizens moved into southern DeKalb County, most of them coming from Atlanta. During the same period, approximately 37,000 white citizens moved out of southern DeKalb County to the surrounding counties.

The District Court made findings with respect to the number of nonwhite citizens in the northern and southern parts of the county for the years 1970 and 1980 without making parallel findings with respect to white citizens. Yet a clear picture does emerge. During the relevant period, the black population in the southern portion of the county experienced tremendous growth while the white population did not, and the white population in the northern part of the county experienced tremendous growth while the black population did not.

The demographic changes that occurred during the course of the desegregation order are an essential foundation for the District Court's analysis of the current racial mix of DCSS. As the District Court observed, the demographic shifts have had "an immense effect on the racial compositions of the DeKalb County schools." *Ibid.* From 1976 to 1986, enrollment in elementary schools declined overall by 15%, while black enrollment in elementary schools increased by 86%. During the same period, overall high school enrollment declined by 16%, while black enrollment in high schools increased by 119%. These effects were even more pronounced in the southern portion of DeKalb County.

Concerned with racial imbalance in the various schools of the district, respondents presented evidence that during the 1986–1987 school year DCSS had the following features: (1) 47% of the students attending DCSS were black; (2) 50% of the black students attended schools that were over 90% black; (3) 62% of all black students attended schools that had more than 20% more blacks than the system-wide average; (4) 27% of white students attended schools that were more than 90% white; (5) 59% of the white students attended schools that had more than 20% more whites than the system-wide average; (6) of the 22 DCSS high schools, five had student populations that were more than 90% black, while five other schools had student populations that were more than 80% white; and (7) of the 74 elementary schools

in DCSS, 18 are over 90% black, while 10 are over 90% white. *Id.*, at 31a. (Respondents' evidence on these points treated all nonblack students as white. The District Court noted that there was no evidence that nonblack minority students constituted even 1% of DCSS student population.)

Respondents argued in the District Court that this racial imbalance in student assignment was a vestige of the dual system, rather than a product of independent demographic forces. In addition to the statistical evidence that the ratio of black students to white students in individual schools varied to a significant degree from the system-wide average, respondents contended that DCSS had not used all available desegregative tools in order to achieve racial balancing. Respondents pointed to the following alleged shortcomings in DCSS' desegregative efforts: (1) DCSS did not break the county into subdistricts and racially balance each subdistrict; (2) DCSS failed to expend sufficient funds for minority learning opportunities; (3) DCSS did not establish community advisory organizations; (4) DCSS did not make full use of the freedom of choice plan; (5) DCSS did not cluster schools, that is, it did not create schools for separate grade levels which could be used to establish a feeder pattern; (6) DCSS did not institute its magnet school program as early as it might have; and (7) DCSS did not use busing to facilitate urban to suburban exchanges.

According to the District Court, respondents conceded that the 1969 order assigning all students to their neighborhood schools "effectively desegregated the DCSS for a period of time" with respect to student assignment. *Id.*, at 35a. The District Court noted, however, that despite this concession respondents contended there was an improper imbalance in two schools even in 1969. Respondents made much of the fact that despite the small percentage of blacks in the county in 1969, there were then two schools that contained a majority of black students: Terry Mill Elementary School

was 76% black, and Stoneview Elementary School was 51% black.

The District Court found the racial imbalance in these schools was not a vestige of the prior *de jure* system. It observed that both the Terry Mill and Stoneview schools were *de jure* white schools before the freedom of choice plan was put in place. It cited expert witness testimony that Terry Mill had become a majority black school as a result of demographic shifts unrelated to the actions of petitioners or their predecessors. In 1966, the overwhelming majority of students at Terry Mill were white. By 1967, due to migration of black citizens from Atlanta into DeKalb County—and into the neighborhood surrounding the Terry Mill school in particular—23% of the students at Terry Mill were black. By 1968, black students constituted 50% of the school population at Terry Mill. By 1969, when the plan was put into effect, the percentage of black students had grown to 76. In accordance with the evidence of demographic shifts, and in the absence of any evidence to suggest that the former dual system contributed in any way to the rapid racial transformation of the Terry Mill student population, the District Court found that the pre-1969 unconstitutional acts of petitioners were not responsible for the high percentage of black students at the Terry Mill school in 1969. Its findings in this respect are illustrative of the problems DCSS and the District Court faced in integrating the whole district.

Although the District Court found that DCSS was desegregated for at least a short period under the court-ordered plan of 1969, it did not base its finding that DCSS had achieved unitary status with respect to student assignment on that circumstance alone. Recognizing that "[t]he achievement of unitary status in the area of student assignment cannot be hedged on the attainment of such status for a brief moment," *id.*, at 37a, the District Court examined the interaction between DCSS policy and demographic shifts in DeKalb County.

The District Court noted that DCSS had taken specific steps to combat the effects of demographics on the racial mix of the schools. Under the 1969 order, a biracial committee had reviewed all proposed changes in the boundary lines of school attendance zones. Since the original desegregation order, there had been about 170 such changes. It was found that only three had a partial segregative effect. An expert testified, and the District Court found, that even those changes had no significant effect on the racial mix of the school population, given the tremendous demographic shifts that were taking place at the same time.

The District Court also noted that DCSS, on its own initiative, started an M-to-M program in the 1972 school year. The program was a marked success. Participation increased with each passing year, so that in the 1986–1987 school year, 4,500 of the 72,000 students enrolled in DCSS participated. An expert testified that the impact of an M-to-M program goes beyond the number of students transferred because students at the receiving school also obtain integrated learning experiences. The District Court found that about 19% of the students attending DCSS had an integrated learning experience as a result of the M-to-M program. *Id.*, at 40a.

In addition, in the 1980's, DCSS instituted a magnet school program in schools located in the middle of the county. The magnet school programs included a performing arts program, two science programs, and a foreign language program. There was testimony in the District Court that DCSS also had plans to operate additional magnet programs in occupational education and gifted and talented education, as well as a preschool program and an open campus. By locating these programs in the middle of the county, DCSS sought to attract black students from the southern part of the county and white students from the northern part.

Further, the District Court found that DCSS operates a number of experience programs integrated by race, including

a writing center for fifth and seventh graders, a driving range, summer school programs, and a dialectical speech program. DCSS employs measures to control the racial mix in each of these special areas.

In determining whether DCSS has achieved unitary status with respect to student assignment, the District Court saw its task as one of deciding if petitioners "have accomplished maximum practical desegregation of the DCSS or if the DCSS must still do more to fulfill their affirmative constitutional duty." *Id.*, at 41a. Petitioners and respondents presented conflicting expert testimony about the potential effects that desegregative techniques not deployed might have had upon the racial mix of the schools. The District Court found that petitioners' experts were more reliable, citing their greater familiarity with DCSS, their experience, and their standing within the expert community. The District Court made these findings:

> "[The actions of DCSS] achieved maximum practical desegregation from 1969 to 1986. The rapid population shifts in DeKalb County were not caused by any action on the part of the DCSS. These demographic shifts were inevitable as the result of suburbanization, that is, work opportunities arising in DeKalb County as well as the City of Atlanta, which attracted blacks to DeKalb; the decline in the number of children born to white families during this period while the number of children born to black families did not decrease; blockbusting of formerly white neighborhoods leading to selling and buying of real estate in the DeKalb area on a highly dynamic basis; and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier. . . . There is no evidence that the school system's previous unconstitutional conduct may have contributed to this segregation. This court is convinced that any further actions taken by defendants, while the actions might have made marginal adjustments in the

> population trends, would not have offset the factors that were described above and the same racial segregation would have occurred at approximately the same speed." *Id.*, at 44a–45a.

The District Court added:

> "[A]bsent massive bussing, which is not considered as a viable option by either the parties or this court, the magnet school program and the M-to-M program, which the defendants voluntarily implemented and to which the defendants obviously are dedicated, are the most effective ways to deal with the effects on student attendance of the residential segregation existing in DeKalb County at this time." *Id.*, at 46a.

Having found no constitutional violation with respect to student assignment, the District Court next considered the other *Green* factors, beginning with faculty and staff assignments. The District Court first found that DCSS had fulfilled its constitutional obligation with respect to hiring and retaining minority teachers and administrators. DCSS has taken active steps to recruit qualified black applicants and has hired them in significant numbers, employing a greater percentage of black teachers than the statewide average. The District Court also noted that DCSS has an "equally exemplary record" in retention of black teachers and administrators. App. to Pet. for Cert. 49a. Nevertheless, the District Court found that DCSS had not achieved or maintained a ratio of black to white teachers and administrators in each school to approximate the ratio of black to white teachers and administrators throughout the system. See *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F. 2d 1211 (CA5 1969), cert. denied, 396 U. S. 1032 (1970). In other words, a racial imbalance existed in the assignment of minority teachers and administrators. The District Court found that in the 1984–1985 school year, seven schools deviated by more than 10% from the system-wide average

of 26.4% minority teachers in elementary schools and 24.9% minority teachers in high schools. The District Court also found that black principals and administrators were overrepresented in schools with high percentages of black students and underrepresented in schools with low percentages of black students.

The District Court found the crux of the problem to be that DCSS has relied on the replacement process to attain a racial balance in teachers and other staff and has avoided using mandatory reassignment. DCSS gave as its reason for not using mandatory reassignment that the competition among local school districts is stiff, and that it is difficult to attract and keep qualified teachers if they are required to work far from their homes. In fact, because teachers prefer to work close to their homes, DCSS has a voluntary transfer program in which teachers who have taught at the same school for a period of three years may ask for a transfer. Because most teachers request to be transferred to schools near their homes, this program makes compliance with the objective of racial balance in faculty and staff more difficult.

The District Court stated that it was not "unsympathetic to the difficulties that DCSS faces in this regard," but held that the law of the Circuit requires DCSS to comply with *Singleton*. App. to Pet. for Cert. 53a. The court ordered DCSS to devise a plan to achieve compliance with *Singleton*, noting that "[i]t would appear that such compliance will necessitate reassignment of both teachers and principals." App. to Pet. for Cert. 58a. With respect to faculty, the District Court noted that meeting *Singleton* would not be difficult, citing petitioners' own estimate that most schools' faculty could conform by moving, at most, two or three teachers.

Addressing the more ineffable category of quality of education, the District Court rejected most of respondents' contentions that there was racial disparity in the provision of certain educational resources (*e. g.*, teachers with advanced

degrees, teachers with more experience, library books), contentions made to show that black students were not being given equal educational opportunity. The District Court went further, however, and examined the evidence concerning achievement of black students in DCSS. It cited expert testimony praising the overall educational program in the district, as well as objective evidence of black achievement: Black students at DCSS made greater gains on the Iowa Tests of Basic Skills than white students, and black students at DCSS are more successful than black students nationwide on the Scholastic Aptitude Test. It made the following finding:

> "While there will always be something more that the DCSS can do to improve the chances for black students to achieve academic success, the court cannot find, as plaintiffs urge, that the DCSS has been negligent in its duties to implement programs to assist black students. The DCSS is a very innovative school system. It has implemented a number of programs to enrich the lives and enhance the academic potential of all students, both blacks and whites. Many remedial programs are targeted in the majority black schools. Programs have been implemented to involve the parents and offset negative socio-economic factors. If the DCSS has failed in any way in this regard, it is not because the school system has been negligent in its duties." App. to Pet. for Cert. 69a–70a (footnote omitted).

Despite its finding that there was no intentional violation, the District Court found that DCSS had not achieved unitary status with respect to quality of education because teachers in schools with disproportionately high percentages of white students tended to be better educated and have more experience than their counterparts in schools with disproportionately high percentages of black students, and because per-pupil expenditures in majority white schools

exceeded per-pupil expenditures in majority black schools. From these findings, the District Court ordered DCSS to equalize spending and remedy the other problems.

The final *Green* factors considered by the District Court were: (1) physical facilities, (2) transportation, and (3) extracurricular activities. The District Court noted that although respondents expressed some concerns about the use of portable classrooms in schools in the southern portion of the county, they in effect conceded that DCSS has achieved unitary status with respect to physical facilities.

In accordance with its factfinding, the District Court held that it would order no further relief in the areas of student assignment, transportation, physical facilities, and extracurricular activities. The District Court, however, did order DCSS to establish a system to balance teacher and principal assignments and to equalize per-pupil expenditures throughout DCSS. Having found that blacks were represented on the school board and throughout DCSS administration, the District Court abolished the biracial committee as no longer necessary.

Both parties appealed to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals affirmed the District Court's ultimate conclusion that DCSS has not yet achieved unitary status, but reversed the District Court's ruling that DCSS has no further duties in the area of student assignment. 887 F. 2d 1438 (1989). The Court of Appeals held that the District Court erred by considering the six *Green* factors as separate categories. The Court of Appeals rejected the District Court's incremental approach, an approach that has also been adopted by the Court of Appeals for the First Circuit, *Morgan* v. *Nucci*, 831 F. 2d 313, 318–319 (1987), and held that a school system achieves unitary status only after it has satisfied all six factors at the same time for several years. 887 F. 2d, at 1446. Because, under this test, DCSS had not achieved unitary status at any time, the Court of Appeals held that DCSS could "not shirk

its constitutional duties by pointing to demographic shifts occurring prior to unitary status." *Id.*, at 1448. The Court of Appeals held that petitioners bore the responsibility for the racial imbalance, and in order to correct that imbalance would have to take actions that "may be administratively awkward, inconvenient, and even bizarre in some situations," *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 28 (1971), such as pairing and clustering of schools, drastic gerrymandering of school zones, grade reorganization, and busing. We granted certiorari, 498 U. S. 1081 (1991).

II

Two principal questions are presented. The first is whether a district court may relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance. As we answer this question in the affirmative, the second question is whether the Court of Appeals erred in reversing the District Court's order providing for incremental withdrawal of supervision in all the circumstances of this case.

A

The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present. This was the rationale and the objective of *Brown I* and *Brown II*. In *Brown I* we said: "To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U. S., at 494. We

quoted a finding of the three-judge District Court in the underlying Kansas case that bears repeating here:

> "'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'" *Ibid.*

The objective of *Brown I* was made more specific by our holding in *Green* that the duty of a former *de jure* district is to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 437–438. We also identified various parts of the school system which, in addition to student attendance patterns, must be free from racial discrimination before the mandate of *Brown* is met: faculty, staff, transportation, extracurricular activities, and facilities. 391 U. S., at 435. The *Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*, and we instructed the District Courts to fashion remedies that address all these components of elementary and secondary school systems.

The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn. But, as we explained last Term in *Board of Ed. of Oklahoma City*

Public Schools v. *Dowell*, 498 U. S. 237, 245–246 (1991), the term "unitary" is not a precise concept:

> "[I]t is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution. . . . Courts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution. We are not sure how useful it is to define these terms more precisely, or to create subclasses within them."

It follows that we must be cautious not to attribute to the term a utility it does not have. The term "unitary" does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles.

That the term "unitary" does not have fixed meaning or content is not inconsistent with the principles that control the exercise of equitable power. The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision. In this respect, as we observed in *Swann*, "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U. S., at 15–16. The requirement of a unitary school system must be implemented according to this prescription.

Our application of these guiding principles in *Pasadena Bd. of Education* v. *Spangler*, 427 U. S. 424 (1976), is instructive. There we held that a District Court exceeded its remedial authority in requiring annual readjustment of school

attendance zones in the Pasadena school district when changes in the racial makeup of the schools were caused by demographic shifts "not attributed to any segregative acts on the part of the [school district]." *Id.*, at 436. In so holding we said:

> "It may well be that petitioners have not yet totally achieved the unitary system contemplated by . . . *Swann*. There has been, for example, dispute as to the petitioners' compliance with those portions of the plan specifying procedures for hiring and promoting teachers and administrators. See 384 F. Supp. 846 (1974), vacated, 537 F. 2d 1031 (1976). But that does not undercut the force of the principle underlying the quoted language from *Swann*. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the [Pasadena Unified School District] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Ibid.*

See also *id.*, at 438, n. 5 ("Counsel for the original plaintiffs has urged, in the courts below and before us, that the District Court's perpetual 'no majority of any minority' requirement was valid and consistent with *Swann*, at least until the school system achieved 'unitary' status in all other respects such as the hiring and promoting of teachers and administrators. Since we have concluded that the case is moot with

regard to these plaintiffs, these arguments are not properly before us. It should be clear from what we have said that they have little substance").

Today, we make explicit the rationale that was central in *Spangler*. A federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control. This discretion derives both from the constitutional authority which justified its intervention in the first instance and its ultimate objectives in formulating the decree. The authority of the court is invoked at the outset to remedy particular constitutional violations. In construing the remedial authority of the district courts, we have been guided by the principles that "judicial powers may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." *Swann*, *supra*, at 16. A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.

We have said that the court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution. *Milliken* v. *Bradley*, 433 U. S. 267, 280–281 (1977) ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution"). Partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities. In *Dowell*, we emphasized that federal judicial supervision of local school systems was intended as a "temporary measure." 498 U. S., at 247. Although this temporary measure has lasted decades, the ultimate objective has not changed—to return school districts to the control of local authorities. Just as a court has the obligation

at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.

As we have long observed, "local autonomy of school districts is a vital national tradition." *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406, 410 (1977) *(Dayton I)*. Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course. As we discuss below, one of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution. Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.

We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. While retaining jurisdiction over the case, the court may determine that it will not order further

remedies in areas where the school district is in compliance with the decree. That is to say, upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations.

A court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power. Among the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

In considering these factors, a court should give particular attention to the school system's record of compliance. A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations. And, with the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may dimin-

ish, and the practicability and efficacy of various remedies can be evaluated with more precision.

These are the premises that guided our formulation in *Dowell* of the duties of a district court during the final phases of a desegregation case: "The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." 498 U. S., at 249–250.

B

We reach now the question whether the Court of Appeals erred in prohibiting the District Court from returning to DCSS partial control over some of its affairs. We decide that the Court of Appeals did err in holding that, as a matter of law, the District Court had no discretion to permit DCSS to regain control over student assignment, transportation, physical facilities, and extracurricular activities, while retaining court supervision over the areas of faculty and administrative assignments and the quality of education, where full compliance had not been demonstrated.

It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance with the court's decree. Both parties agreed that quality of education was a legitimate inquiry in determining DCSS' compliance with the desegregation decree, and the trial court found it workable to consider the point in connection with its findings on resource allocation. Its order retaining supervision over this aspect of the case has not been challenged by the parties, and we need not examine it except as it underscores the school district's record of compliance in some areas but not others. The District Court's approach illustrates

that the *Green* factors need not be a rigid framework. It illustrates also the uses of equitable discretion. By withdrawing control over areas where judicial supervision is no longer needed, a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students.

The Court of Appeals' rejection of the District Court's order rests on related premises: first, that given noncompliance in some discrete categories, there can be no partial withdrawal of judicial control; and second, until there is full compliance, heroic measures must be taken to ensure racial balance in student assignments system wide. Under our analysis and our precedents, neither premise is correct.

The Court of Appeals was mistaken in ruling that our opinion in *Swann* requires "awkward," "inconvenient," and "even bizarre" measures to achieve racial balance in student assignments in the late phases of carrying out a decree, when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces. In *Swann* we undertook to discuss the objectives of a comprehensive desegregation plan and the powers and techniques available to a district court in designing it at the outset. We confirmed that racial balance in school assignments was a necessary part of the remedy in the circumstances there presented. In the case before us the District Court designed a comprehensive plan for desegregation of DCSS in 1969, one that included racial balance in student assignments. The desegregation decree was designed to achieve maximum practicable desegregation. Its central remedy was the closing of black schools and the reassignment of pupils to neighborhood schools, with attendance zones that achieved racial balance. The plan accomplished its objective in the first year of operation, before dramatic demographic changes altered residen-

tial patterns. For the entire 17-year period respondents raised no substantial objection to the basic student assignment system, as the parties and the District Court concentrated on other mechanisms to eliminate the *de jure* taint.

That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. *Swann*, 402 U. S., at 31–32 ("Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary"). If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.

The findings of the District Court that the population changes which occurred in DeKalb County were not caused by the policies of the school district, but rather by independent factors, are consistent with the mobility that is a distinct characteristic of our society. In one year (from 1987 to 1988) over 40 million Americans, or 17.6% of the total population,

moved households. U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 19 (111th ed. 1991) (Table 25). Over a third of those people moved to a different county, and over six million migrated between States. *Ibid.* In such a society it is inevitable that the demographic makeup of school districts, based as they are on political subdivisions such as counties and municipalities, may undergo rapid change.

The effect of changing residential patterns on the racial composition of schools, though not always fortunate, is somewhat predictable. Studies show a high correlation between residential segregation and school segregation. Wilson & Taeuber, Residential and School Segregation: Some Tests of Their Association, in Demography and Ethnic Groups 57–58 (F. Bean & W. Frisbie eds. 1978). The District Court in this case heard evidence tending to show that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50–50 mix.

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.

In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its con-

sequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.

As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith. In light of its finding that the demographic changes in DeKalb County are unrelated to the prior violation, the District Court was correct to entertain the suggestion that DCSS had no duty to achieve system-wide racial balance in the student population. It was appropriate for the District Court to examine the reasons for the racial imbalance before ordering an impractical, and no doubt massive, expenditure of funds to achieve racial balance after 17 years of efforts to implement the comprehensive plan in a district where there were fundamental changes in demographics, changes not attributable to the former *de jure* regime or any later actions by school officials. The District Court's determination to order instead the expenditure of scarce resources in areas such as the quality of education, where full compliance had not yet been achieved, underscores the uses of discretion in framing equitable remedies.

To say, as did the Court of Appeals, that a school district must meet all six *Green* factors before the trial court can declare the system unitary and relinquish its control over school attendance zones, and to hold further that racial balancing by all necessary means is required in the interim, is

simply to vindicate a legal phrase. The law is not so formalistic. A proper rule must be based on the necessity to find a feasible remedy that ensures system-wide compliance with the court decree and that is directed to curing the effects of the specific violation.

We next consider whether retention of judicial control over student attendance is necessary or practicable to achieve compliance in other facets of the school system. Racial balancing in elementary and secondary school student assignments may be a legitimate remedial device to correct other fundamental inequities that were themselves caused by the constitutional violation. We have long recognized that the *Green* factors may be related or interdependent. Two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well. We have observed, for example, that student segregation and faculty segregation are often related problems. See *Dayton Bd. of Education* v. *Brinkman*, 443 U. S. 526, 536 (1979) *(Dayton II)* ("'[P]urposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices'"); *Rogers* v. *Paul*, 382 U. S. 198, 200 (1965) (students have standing to challenge racial allocation of faculty because "racial allocation of faculty denies them equality of educational opportunity without regard to segregation of pupils"). As a consequence, a continuing violation in one area may need to be addressed by remedies in another. See, *e. g.*, *Bradley* v. *Richmond School Bd.*, 382 U. S. 103, 105 (1965) *(per curiam)* ("There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative"); *Vaughns* v. *Board of Education of Prince George's County*, 742 F. Supp. 1275, 1291 (Md. 1990) ("[T]he components of

a school desegregation plan are interdependent upon, and interact with, one another, so that changes with respect to one component may impinge upon the success or failure of another").

There was no showing that racial balancing was an appropriate mechanism to cure other deficiencies in this case. It is true that the school district was not in compliance with respect to faculty assignments, but the record does not show that student reassignments would be a feasible or practicable way to remedy this defect. To the contrary, the District Court suggests that DCSS could solve the faculty assignment problem by reassigning a few teachers per school. The District Court, not having our analysis before it, did not have the opportunity to make specific findings and conclusions on this aspect of the case, however. Further proceedings are appropriate for this purpose.

The requirement that the school district show its good-faith commitment to the entirety of a desegregation plan so that parents, students, and the public have assurance against further injuries or stigma also should be a subject for more specific findings. We stated in *Dowell* that the good-faith compliance of the district with the court order over a reasonable period of time is a factor to be considered in deciding whether or not jurisdiction could be relinquished. 498 U. S., at 249–250 ("The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable"). A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future. See *Morgan* v. *Nucci*, 831

F. 2d, at 321 ("A finding of good faith . . . reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual").

When a school district has not demonstrated good faith under a comprehensive plan to remedy ongoing violations, we have without hesitation approved comprehensive and continued district court supervision. See *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449, 461 (1979) (predicating liability in part on the finding that the school board "'never actively set out to dismantle [the] dual system,'" *Penick* v. *Columbus Bd. of Education*, 429 F. Supp. 229, 260 (SD Ohio 1977)); *Dayton II*, *supra*, at 534 (adopting Court of Appeals holding that the "intentionally segregative impact of various practices since 1954 . . . were of systemwide import and an appropriate basis for a systemwide remedy").

In contrast to the circumstances in *Penick* and *Brinkman*, the District Court in this case stated that throughout the period of judicial supervision it has been impressed by the successes DCSS has achieved and its dedication to providing a quality education for all students, and that DCSS "has travelled the often long road to unitary status almost to its end." With respect to those areas where compliance had not been achieved, the District Court did not find that DCSS had acted in bad faith or engaged in further acts of discrimination since the desegregation plan went into effect. This, though, may not be the equivalent of a finding that the school district has an affirmative commitment to comply in good faith with the entirety of a desegregation plan, and further proceedings are appropriate for this purpose as well.

The judgment is reversed, and the case is remanded to the Court of Appeals. It should determine what issues are open for its further consideration in light of the previous briefs and arguments of the parties and in light of the principles set forth in this opinion. Thereupon it should order further

proceedings as necessary or order an appropriate remand to the District Court.

Each party is to bear its own costs.

It is so ordered.

JUSTICE THOMAS took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring.

The District Court in the present case found that the imbalances in student assignment were attributable to private demographic shifts rather than governmental action. Without disturbing this finding, and without finding that revision of student assignments was necessary to remedy some other unlawful government action, the Court of Appeals ordered DeKalb County to institute massive busing and other programs to achieve integration. The Court convincingly demonstrates that this cannot be reconciled with our cases, and I join its opinion.

Our decision will be of great assistance to the citizens of DeKalb County, who for the first time since 1969 will be able to run their own public schools, at least so far as student assignments are concerned. It will have little effect, however, upon the many other school districts throughout the country that are still being supervised by federal judges, since it turns upon the extraordinarily rare circumstance of a *finding* that no portion of the current racial imbalance is a remnant of prior *de jure* discrimination. While it is perfectly appropriate for the Court to decide this case on that narrow basis, we must resolve—if not today, then soon—what is to be done in the vast majority of other districts, where, though our cases continue to profess that judicial oversight of school operations is a temporary expedient, democratic processes remain suspended, with no prospect of restoration, 38 years after *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

Almost a quarter century ago, in *Green* v. *School Bd. of New Kent County*, 391 U. S. 430, 437–438 (1968), this Court held that school systems which had been enforcing *de jure* segregation at the time of *Brown* had not merely an obligation to assign students and resources on a race-neutral basis but also an "affirmative duty" to "desegregate," that is, to achieve insofar as practicable racial balance in their schools. This holding has become such a part of our legal fabric that there is a tendency, reflected in the Court of Appeals opinion in this case, to speak as though the Constitution requires such racial balancing. Of course it does not: The Equal Protection Clause reaches only those racial imbalances shown to be intentionally caused by the State. As the Court reaffirms today, if "desegregation" (*i. e.*, racial balancing) were properly to be ordered in the present case, it would be not because the extant racial imbalance in the DeKalb County School System offends the Constitution, but rather because that imbalance is a "lingering effect" of the pre-1969 *de jure* segregation that offended the Constitution. For all our talk about "unitary status," "release from judicial supervision," and "affirmative duty to desegregate," the sole question in school desegregation cases (absent an allegation that current policies are intentionally discriminatory) is one of remedies for past violations.

Identifying and undoing the effects of some violations of the law is easy. Where, for example, a tax is found to have been unconstitutionally imposed, calculating the funds derived from that tax (which must be refunded), and distinguishing them from the funds derived from other taxes (which may be retained), is a simple matter. That is not so with respect to the effects of unconstitutionally operating a legally segregated school system; they are uncommonly difficult to identify and to separate from the effects of other causes. But one would not know that from our instructions to the lower courts on this subject, which tend to be at a level of generality that assumes facile reduction to specifics.

"'[Desegregation] decrees,'" we have said, "'exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation,'" *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 247 (1991); *Milliken* v. *Bradley*, 433 U. S. 267, 282 (1977). We have never sought to describe how one identifies a condition as the effluent of a violation, or how a "vestige" or a "remnant" of past discrimination is to be recognized. Indeed, we have not even betrayed an awareness that these tasks are considerably more difficult than calculating the amount of taxes unconstitutionally paid. It is time for us to abandon our studied disregard of that obvious truth and to adjust our jurisprudence to its reality.

Since parents and school boards typically want children to attend schools in their own neighborhood, "[t]he principal cause of racial and ethnic imbalance in . . . public schools across the country—North and South—is the imbalance in residential patterns." *Austin Independent School Dist.* v. *United States*, 429 U. S. 990, 994 (1976) (Powell, J., concurring). That imbalance in residential patterns, in turn, "doubtless result[s] from a mélange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one's own race or ethnic background." *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449, 512 (1979) (REHNQUIST, J., dissenting); see also *Pasadena Bd. of Education* v. *Spangler*, 427 U. S. 424, 435–437 (1976). Consequently, residential segregation "is a national, not a southern[,] phenomenon" which exists "'regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation or discrimination.'" *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 223, and n. 9 (1973) (Powell, J., concurring in part and dissenting in part), quoting K. Taeuber, Negroes in Cities 36 (1965).

Racially imbalanced schools are hence the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be *as* segregated, in the absence of a particular one of those factors is guesswork. It is similarly guesswork, of course, to say that they *would* be segregated, or would be *as* segregated, in the absence of one of those factors. Only in rare cases such as this one and *Spangler*, see 427 U. S., at 435–437, where the racial imbalance had been temporarily corrected after the abandonment of *de jure* segregation, can it be asserted with any degree of confidence that the past discrimination is no longer playing a proximate role. Thus, allocation of the burden of proof foreordains the result in almost all of the "vestige of past discrimination" cases. If, as is normally the case under our equal protection jurisprudence (and in the law generally), we require the plaintiffs to establish the asserted facts entitling them to relief—that the racial imbalance they wish corrected is at least in part the vestige of an old *de jure* system—the plaintiffs will almost always lose. Conversely, if we alter our normal approach and require the school authorities to establish the negative—that the imbalance is *not* attributable to their past discrimination—the plaintiffs will almost always win. See *Penick*, *supra*, at 471 (Stewart, J., concurring in result).

Since neither of these alternatives is entirely palatable, an observer unfamiliar with the history surrounding this issue might suggest that we avoid the problem by requiring only that the school authorities establish a regime in which parents are free to disregard neighborhood-school assignment, and to send their children (with transportation paid) to whichever school they choose. So long as there is free choice, he would say, there is no reason to require that the schools be made identical. The constitutional right is equal racial access to schools, not access to racially equal schools; whatever racial imbalances such a free-choice system might produce would be the product of private forces. We appar-

ently envisioned no more than this in our initial post-*Brown* cases.* It is also the approach we actually adopted in *Bazemore* v. *Friday*, 478 U. S. 385, 407–409 (1986) (WHITE, J., concurring), which concerned remedies for prior *de jure* segregation of state university-operated clubs and services.

But we ultimately charted a different course with respect to public elementary and secondary schools. We concluded in *Green* that a "freedom of choice" plan was not necessarily sufficient, 391 U. S., at 439–440, and later applied this conclusion to all jurisdictions with a history of intentional segregation:

> "'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments." *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 28 (1971).

---

*See, *e. g.*, *Cooper* v. *Aaron*, 358 U. S. 1, 7 (1958) ("[O]bedience to the duty of desegregation would require the immediate general admission of Negro children . . . at particular schools"); *Goss* v. *Board of Education of Knoxville*, 373 U. S. 683, 687 (1963) (holding unconstitutional a minority-to-majority transfer policy which was unaccompanied by a policy allowing majority-to-minority transfers, but noting that "if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or transfer to another").

Thus began judicial recognition of an "affirmative duty" to desegregate, *id.*, at 15; *Green, supra*, at 437–438, achieved by allocating the burden of negating causality to the defendant. Our post-*Green* cases provide that, once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, effectively irrebuttable (because the school district cannot prove the negative), that any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed, see, *e. g., Swann, supra*, at 26; *Keyes*, 413 U. S., at 209–210.

In the context of elementary and secondary education, the presumption was extraordinary in law but not unreasonable in fact. "Presumptions normally arise when proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.'" *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 788–789 (1990), quoting E. Cleary, McCormick on Evidence §343, p. 969 (3d ed. 1984). The extent and recency of the prior discrimination, and the improbability that young children (or their parents) would use "freedom of choice" plans to disrupt existing patterns "warrant[ed] a presumption [that] schools that are substantially disproportionate in their racial composition" were remnants of the *de jure* system. *Swann, supra*, at 26.

But granting the merits of this approach at the time of *Green*, it is now 25 years later. "From the very first, federal supervision of local school systems was intended as a *temporary* measure to remedy past discrimination." *Dowell*, 498 U. S., at 247 (emphasis added). We envisioned it as temporary partly because "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," *Milliken* v. *Bradley*, 418 U. S. 717, 741 (1974) *(Milliken I)*, and because no one's interest is furthered by subjecting the Nation's educational system to "judicial tutelage for the indefinite future," *Dowell, supra*, at 249; see also

Dayton Bd. of Education v. *Brinkman*, 433 U. S. 406, 410 (1977); *Spangler* v. *Pasadena City Bd. of Education*, 611 F. 2d 1239, 1245, n. 5 (CA9 1979) (Kennedy, J., concurring). But we also envisioned it as temporary, I think, because the rational basis for the extraordinary presumption of causation simply must dissipate as the *de jure* system and the school boards who produced it recede further into the past. Since a multitude of private factors has shaped school systems in the years after abandonment of *de jure* segregation—normal migration, population growth (as in this case), "white flight" from the inner cities, increases in the costs of new facilities—the percentage of the current makeup of school systems attributable to the prior, government-enforced discrimination has diminished with each passing year, to the point where it cannot realistically be assumed to be a significant factor.

At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time. While we must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences, we should consider laying aside the extraordinary, and increasingly counterfactual, presumption of *Green*. We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging equal protection violations must prove intent and causation and not merely the existence of racial disparity, see *Bazemore*, *supra*, at 407–409 (WHITE, J., concurring); *Washington* v. *Davis*, 426 U. S. 229, 245 (1976); that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, see, *e. g.*, *Dowell*, *supra*, at 248; *Dayton*, *supra*, at 410; *Milliken I*, *supra*, at

741–742; and that it is "desirable" to permit pupils to attend "schools nearest their homes," *Swann*, 402 U. S., at 28.

JUSTICE SOUTER, concurring.

I join the Court's opinion holding that where there are vestiges of a dual system in some of a judicially supervised school system's aspects, or *Green*-type factors,* a district court will retain jurisdiction over the system, but need not maintain constant supervision or control over factors as to which compliance has been achieved. I write separately only to explain my understanding of the enquiry required by a district court applying the principle we set out today.

We recognize that although demographic changes influencing the composition of a school's student population may well have no causal link to prior *de jure* segregation, judicial control of student assignments may still be necessary to remedy persisting vestiges of the unconstitutional dual system, such as remaining imbalance in faculty assignments. See *ante*, at 497–498. This is, however, only one of several possible causal relationships between or among unconstitutional acts of school segregation and various *Green*-type factors. I think it is worth mentioning at least two others: the dual school system itself as a cause of the demographic shifts with which the district court is faced when considering a partial relinquishment of supervision, and a *Green*-type factor other than student assignments as a possible cause of imbalanced student assignment patterns in the future.

The first would occur when demographic change toward segregated residential patterns is itself caused by past school segregation and the patterns of thinking that segregation creates. Such demographic change is not an independent, supervening cause of racial imbalance in the student body, and we have said before that when demographic change is

**Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968). *Green*'s list of specific factors, of course, need not be treated as exclusive. See *ante*, at 492–493.

not independent of efforts to segregate, the causal relationship may be considered in fashioning a school desegregation remedy. See *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 21 (1971). Racial imbalance in student assignments caused by demographic change is not insulated from federal judicial oversight where the demographic change is itself caused in this way, and before deciding to relinquish supervision and control over student assignments, a district court should make findings on the presence or absence of this relationship.

The second and related causal relationship would occur after the district court has relinquished supervision over a remedied aspect of the school system, when future imbalance in that remedied *Green*-type factor (here, student assignments) would be caused by remaining vestiges of the dual system. Even after attaining compliance as to student composition, other factors such as racial composition of the faculty, quality of the physical plant, or per-pupil expenditures may leave schools racially identifiable. (In this very case, for example, there is a correlation in particular schools of overrepresentation of black principals and administrators, lower per-pupil expenditures, and high percentages of black students. Moreover, the schools in the predominantly black southern section of the school district are the only ones that use "portable classrooms," *i. e.*, trailers. See *ante*, at 481–482, 484.) If such other factors leave a school identifiable as "black," as soon as the district court stops supervising student assignments, nearby white parents may move in the direction of racially identifiable "white" schools, or may simply move their children into these schools. In such a case, the vestige of discrimination in one factor will act as an incubator for resegregation in others. Before a district court ends its supervision of student assignments, then, it should make a finding that there is no immediate threat of unremedied *Green*-type factors causing population or student enrollment changes that in turn may imbalance student composi-

tion in this way. And, because the district court retains jurisdiction over the case, it should of course reassert control over student assignments if it finds that this does happen.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in the judgment.

It is almost 38 years since this Court decided *Brown* v. *Board of Education*, 347 U. S. 483 (1954). In those 38 years the students in DeKalb County, Ga., never have attended a desegregated school system even for one day. The majority of "black" students never have attended a school that was not disproportionately black. Ignoring this glaring dual character of the DeKalb County School System (DCSS), part "white" and part "black," the District Court relinquished control over student assignments, finding that the school district had achieved "unitary status" in that aspect of the system. No doubt frustrated by the continued existence of duality, the Court of Appeals ordered the school district to take extraordinary measures to correct all manifestations of this racial imbalance. Both decisions, in my view, were in error, and I therefore concur in the Court's decision to vacate the judgment and remand the case.

I also am in agreement with what I consider to be the holdings of the Court. I agree that in some circumstances the District Court need not interfere with a particular portion of the school system, even while, in my view, it must retain jurisdiction over the entire system until all vestiges of state-imposed segregation have been eliminated. See *ante*, at 490–491. I also agree that whether the District Court must order DCSS to balance student assignments depends on whether the current imbalance is traceable to unlawful state policy and on whether such an order is necessary to fashion an effective remedy. See *ante*, at 491, 493–494, 497–498. Finally, I agree that the good faith of the school board is relevant to these inquiries. See *ante*, at 498–499.

I write separately for two purposes. First, I wish to be precise about my understanding of what it means for the District Court in this case to retain jurisdiction while relinquishing "supervision and control" over a subpart of a school system under a desegregation decree. Second, I write to elaborate on factors the District Court should consider in determining whether racial imbalance is traceable to board actions and to indicate where, in my view, it failed to apply these standards.

I

Beginning with *Brown*, and continuing through the Court's most recent school-desegregation decision in *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237 (1991), this Court has recognized that when the local government has been running *de jure* segregated schools, it is the operation of a racially segregated school *system* that must be remedied, not discriminatory policy in some discrete subpart of that system. Consequently, the Court in the past has required, and decides again today, that even if the school system ceases to discriminate with respect to one of the *Green*-type factors, "the [district] court should retain jurisdiction until it is clear that state-imposed segregation has been *completely removed.*" *Green* v. *School Bd. of New Kent County*, 391 U. S. 430, 439 (1968) (emphasis added); *Raney* v. *Board of Ed. of Gould School Dist.*, 391 U. S. 443, 449 (1968); see *ante*, at 491.

That the District Court's jurisdiction should continue until the school board demonstrates full compliance with the Constitution follows from the reasonable skepticism that underlies judicial supervision in the first instance. This Court noted in *Dowell:* "A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future." 498 U. S., at 249. It makes little sense, it seems to me, for the court to disarm itself by renouncing jurisdiction in one aspect of a school system, while violations of the Equal Protec-

tion Clause persist in other aspects of the same system. Cf. *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 207 (1973). It would seem especially misguided to place unqualified reliance on the school board's promises in this case, because the two areas of the school system the District Court found still in violation of the Constitution—expenditures and teacher assignments—are two of the *Green* factors over which DCSS exercises the greatest control.

The obligations of a district court and a school district under its jurisdiction have been clearly articulated in the Court's many desegregation cases. Until the desegregation decree is dissolved under the standards set forth in *Dowell*, the school board continues to have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green*, 391 U. S., at 437–438. The duty remains enforceable by the district court without any new proof of a constitutional violation, and the school district has the burden of proving that its actions are eradicating the effects of the former *de jure* regime. See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 537 (1979); *Keyes*, 413 U. S., at 208–211; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 26 (1971); *Green*, 391 U. S., at 439.

Contrary to the Court of Appeals' conclusion, however, retaining jurisdiction does not obligate the district court in all circumstances to maintain active supervision and control, continually ordering reassignment of students. The "duty" of the district court is to guarantee that the school district "'eliminate[s] the discriminatory effects of the past as well as to bar like discrimination in the future.'" *Green*, 391 U. S., at 438, n. 4. This obligation requires the court to review school-board actions to ensure that each one "will further rather than delay conversion to a unitary, nonracial nondiscriminatory school system." *Monroe* v. *Board of Comm'rs of Jackson*, 391 U. S. 450, 459 (1968); see also *Dayton Board of Education*, 443 U. S., at 538; *United States* v.

Scotland Neck Board of Education, 407 U. S. 484, 489 (1972). But this obligation does not always require the district court to order new, affirmative action simply because of racial imbalance in student assignment.

Whether a district court must maintain active supervision over student assignment, and order new remedial actions, depends on two factors. As the Court discusses, the district court must order changes in student assignment if it "is necessary or practicable to achieve compliance in other facets of the school system." *Ante*, at 497; see also *ante*, at 507 (SOUTER, J., concurring). The district court also must order affirmative action in school attendance if the school district's conduct was a "contributing cause" of the racially identifiable schools. *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 465, n. 13 (1979); see also *Keyes*, 413 U. S., at 211, and n. 17 (the school board must prove that its conduct "did not create or contribute to" the racial identifiability of schools or that racially identifiable schools are "in no way the result of" school board action). It is the application of this latter causation requirement that I now examine in more detail.

II

A

DCSS claims that it need not remedy the segregation in DeKalb County schools because it was caused by demographic changes for which DCSS has no responsibility. It is not enough, however, for DCSS to establish that demographics exacerbated the problem; it must prove that its own policies did not contribute.[1] Such contribution can occur in at

[1] The Court's cases make clear that there is a presumption in a former *de jure* segregated school district that the board's actions caused the racially identifiable schools, and it is the school board's obligation to rebut that presumption. See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 537 (1979); *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 208, 211 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 26 (1971); *ante*, at 494–495.

least two ways: DCSS may have contributed to the demographic changes themselves, or it may have contributed directly to the racial imbalance in the schools.

To determine DCSS' possible role in encouraging the residential segregation, the court must examine the situation with special care. "[A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist." *Keyes*, 413 U. S., at 211. Close examination is necessary because what might seem to be purely private preferences in housing may in fact have been created, in part, by actions of the school district.

> "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." *Swann*, 402 U. S., at 20–21.

This interactive effect between schools and housing choices may occur because many families are concerned about the racial composition of a prospective school and will make residential decisions accordingly.[2] Thus, schools that are demonstrably black or white provide a signal to these families, perpetuating and intensifying the residential movement. See *Keyes*, 413 U. S., at 202; *Columbus Board of Education*, 443 U. S., at 465, n. 13; *ante*, at 507–508 (SOUTER, J., concurring).

School systems can identify a school as "black" or "white" in a variety of ways; choosing to enroll a racially identifiable

---

[2] See Taeuber, Housing, Schools, and Incremental Segregative Effects, 441 Annals Am. Acad. Pol. & Soc. Sci. 157 (1979); Orfield, School Segregation and Residential Segregation, in School Desegregation: Past, Present, and Future 227, 234–237 (W. Stephan & J. Feagin eds. 1980); Elam, The 22nd Annual Gallup Poll of Public's Attitudes Toward the Public Schools, 72 Phi Delta Kappan 41, 44–45 (1990).

student population is only the most obvious. The Court has noted: "[T]he use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition." *Keyes*, 413 U. S., at 202. Because of the various methods for identifying schools by race, even if a school district manages to desegregate student assignments at one point, its failure to remedy the constitutional violation in its entirety may result in resegregation, as neighborhoods respond to the racially identifiable schools. See *ante*, at 508–509 (SOUTER, J., concurring). Regardless of the particular way in which the school district has encouraged residential segregation, this Court's decisions require that the school district remedy the effect that such segregation has had on the school system.

In addition to exploring the school district's influence on residential segregation, the District Court here should examine whether school-board actions might have contributed to school segregation. Actions taken by a school district can aggravate or eliminate school segregation independent of residential segregation. School-board policies concerning placement of new schools and closure of old schools and programs such as magnet classrooms and majority-to-minority (M-to-M) transfer policies affect the racial composition of the schools. See *Swann*, 402 U. S., at 20–21, 26–27. A school district's failure to adopt policies that effectively desegregate its schools continues the violation of the Fourteenth Amendment. See *Columbus Board of Education*, 443 U. S., at 458–459; *Dayton Board of Education*, 443 U. S., at 538. The Court many times has noted that a school district is not responsible for all of society's ills, but it bears full responsibility for schools that have never been desegregated. See, *e. g.*, *Swann*, *supra*.

B

The District Court's opinion suggests that it did not examine DCSS' actions in light of the foregoing principles. The court did note that the migration farther into the suburbs was accelerated by "white flight" from black schools and the "blockbusting" of former white neighborhoods. It did not examine, however, whether DCSS might have encouraged that flight by assigning faculty and principals so as to identify some schools as intended respectively for black students or white students. See App. 226–231. Nor did the court consider how the placement of schools, the attendance zone boundaries, or the use of mobile classrooms might have affected residential movement. The court, in my view, failed to consider the many ways DCSS may have contributed to the demographic shifts.

Nor did the District Court correctly analyze whether DCSS' past actions had contributed to the school segregation independent of residential segregation. The court did not require DCSS to bear the "heavy burden" of showing that student assignment policies—policies that continued the effects of the dual system—served important and legitimate ends. See *Dayton Board of Education*, 443 U. S., at 538; *Swann*, 402 U. S., at 26. Indeed, the District Court said flatly that it would "not dwell on what might have been," but would inquire only as to "what else should be done now." App. 221. But this Court's decisions *require* the District Court to "dwell on what might have been." In particular, they require the court to examine the past to determine whether the current racial imbalance in the schools is attributable in part to the former *de jure* segregated regime or any later actions by school officials.

As the Court describes, the District Court placed great emphasis on its conclusion that DCSS, in response to the court order, had desegregated student assignment in 1969. DCSS' very first action taken in response to the court decree, however, was to shape attendance zones to result

in two schools that were more than 50% black, despite a district-wide black student population of less than 6%. See *ante*, at 477–478. Within a year, another school became majority black, followed by four others within the next two years. App. 304, 314, 350, 351, 368. Despite the existence of these schools, the District Court found that DCSS effectively had desegregated for a short period of time with respect to student assignment. See *ante*, at 478. The District Court justified this finding by linking the school segregation exclusively to residential segregation existing prior to the court order. See *ibid.*

But residential segregation that existed *prior* to the desegregation decree cannot provide an excuse. It is not enough that DCSS adopt race-neutral policies in response to a court desegregation decree. Instead, DCSS is obligated to "counteract the continuing effects of past school segregation." *Swann*, 402 U. S., at 28. Accordingly, the school district did not meet its affirmative duty simply by adopting a neighborhood-school plan, when already existing residential segregation inevitably perpetuated the dual system. See *Davis* v. *Board of School Comm'rs of Mobile County*, 402 U. S. 33, 37 (1971); *Swann*, 402 U. S., at 25–28, 30.

Virtually all the demographic changes that DCSS claims caused the school segregation occurred after 1975. See *ante*, at 475; App. 215, 260. Of particular relevance to the causation inquiry, then, are DCSS' actions prior to 1975; failures during that period to implement the 1969 decree render the school district's contentions that its noncompliance is due simply to demographic changes less plausible.

A review of the record suggests that from 1969 until 1975, DCSS failed to desegregate its schools. During that period, the number of students attending racially identifiable schools actually increased, and increased more quickly than the increase in black students. By 1975, 73% of black elementary students and 56% of black high school students were attending majority black schools, although the percentages of black

students in the district population were just 20% and 13%, respectively. *Id.*, at 269–380.

Of the 13 new elementary schools DCSS opened between 1969 and 1975, 6 had a total of four black students in 1975. *Id.*, at 272, 299, 311, 316, 337, 353. One of the two high schools DCSS opened had no black students at all.[3] *Id.*, at 367, 361. The only other measure taken by DCSS during the 1969–1975 period was to adopt the M-to-M transfer program in 1972. Due, however, to limitations imposed by school-district administrators—including a failure to provide transportation, "unnecessary red tape," and limits on available transfer schools—only one-tenth of 1% of the students were participating in the transfer program as of the 1975–1976 school year. *Id.*, at 75, 80.

In 1976, when the District Court reviewed DCSS' actions in the M-to-M program, it concluded that DCSS' limitations on the program "perpetuate the vestiges of a dual system." *Id.*, at 83. Noting that the Department of Health, Education, and Welfare had found that DCSS had ignored its responsibility affirmatively to eradicate segregation and perpetuate desegregation, the District Court found that attendance zone changes had perpetuated the dual system in the county. *Id.*, at 89, 91.

Thus, in 1976, before most of the demographic changes, the District Court found that DCSS had not complied with the 1969 order to eliminate the vestiges of its former *de jure* school system. Indeed, the 1976 order found that DCSS had contributed to the growing racial imbalance of its schools. Given these determinations in 1976, the District Court, at a minimum, should have required DCSS to prove that, but for the demographic changes between 1976 and 1985, its actions would have been sufficient to "convert promptly to a system without a 'white' school and a 'Negro' school, but just

[3] By 1986, one of those two high schools was 2.4% black. The other was 91.7% black. Of the 13 elementary schools, 8 were either virtually all black or all white and all were racially identifiable. App. 269–359.

schools." *Green*, 391 U. S., at 442. The available evidence suggests that this would be a difficult burden for DCSS to meet.

DCSS has undertaken only limited remedial actions since the 1976 court order. The number of students participating in the M-to-M program has expanded somewhat, composing about 6% of the current student population. The district also has adopted magnet programs, but they involve fewer than 1% of the system's students. Doubtless DCSS could have started and expanded its magnet and M-to-M programs more promptly; it could have built and closed schools with a view toward promoting integration of both schools and neighborhoods; redrawn attendance zones; integrated its faculty and administrators; and spent its funds equally. But it did not. DCSS must prove that the measures it actually implemented satisfy its obligation to eliminate the vestiges of *de jure* segregation originally discovered in 1969, and still found to exist in 1976.

III

The District Court apparently has concluded that DCSS should be relieved of the responsibility to desegregate because such responsibility would be burdensome. To be sure, changes in demographic patterns aggravated the vestiges of segregation and made it more difficult for DCSS to desegregate. But an integrated school system is no less desirable because it is difficult to achieve, and it is no less a constitutional imperative because that imperative has gone unmet for 38 years.

Although respondents challenged the District Court's causation conclusions in the Court of Appeals, that court did not reach the issue. Accordingly, in addition to the issues the Court suggests be considered in further proceedings, I would remand for the Court of Appeals to review, under the foregoing principles, the District Court's finding that DCSS has met its burden of proving the racially identifiable schools are in no way the result of past segregative action.

Syllabus

YEE ET AL. *v.* CITY OF ESCONDIDO, CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 90–1947. Argued January 22, 1992—Decided April 1, 1992

The Fifth Amendment's Takings Clause generally requires just compensation where the government authorizes a physical occupation of property. But where the government merely regulates the property's use, compensation is required only if considerations such as the regulation's purpose or the extent to which it deprives the owner of the property's economic use suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. Petitioners, mobile home park owners in respondent Escondido, California, rent pads of land to mobile home owners. When the homes are sold, the new owners generally continue to rent the pads. Under the California Mobilehome Residency Law, the bases upon which a park owner may terminate a mobile home owner's tenancy are limited to, *inter alia*, nonpayment of rent and the park owner's desire to change the use of his land. The park owner may not require the removal of a mobile home when it is sold and may neither charge a transfer fee for the sale nor disapprove of a purchaser who is able to pay rent. The state law does not limit the rent the park owner may charge, but Escondido has a rent control ordinance setting mobile home rents back to their 1986 levels and prohibiting rent increases without the city council's approval. The Superior Court dismissed lawsuits filed by petitioners and others challenging the ordinance, rejecting the argument that the ordinance effected a physical taking by depriving park owners of all use and occupancy of their property and granting to their tenants, and their tenants' successors, the right to physically permanently occupy and use the property. The Court of Appeal affirmed.

Held:

1. The rent control ordinance does not authorize an unwanted physical occupation of petitioners' property and thus does not amount to a *per se* taking. Petitioners' argument—that the rent control ordinance authorizes a physical taking because, coupled with the state law's restrictions, it increases a mobile home's value by giving the homeowner the right to occupy the pad indefinitely at a submarket rent—is unpersuasive. The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. Here, petitioners have voluntarily rented their land to mobile home

owners and are not required to continue to do so by either the city or the State. On their face, the laws at issue merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant. Any transfer of wealth from park owners to incumbent mobile home owners in the form of submarket rent does not itself convert regulation into physical invasion. Additional contentions made by petitioners—that the ordinance benefits current mobile home owners but not future owners, who must purchase the homes at premiums resulting from the homes' increased value, and that the ordinance deprives petitioners of the ability to choose their incoming tenants—might have some bearing on whether the ordinance causes a regulatory taking, but have nothing to do with whether it causes a physical taking. Moreover, the footnote in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 439, n. 17—that a physical taking claim cannot be defeated by an argument that a landlord can avoid a statute's restrictions by ceasing to rent his property, because his ability to rent may not be conditioned on forfeiting the right to compensation for a physical occupation—has no relevance here, where there has been no physical taking. Since petitioners have made no attempt to change how their land is used, this case also presents no occasion to consider whether the statute, as applied, prevents them from making a change. Pp. 526–532.

2. Petitioners' claim that the ordinance constitutes a denial of substantive due process is not properly before this Court because it was not raised below or addressed by the state courts. The question whether this Court's customary refusal to consider claims not raised or addressed below is a jurisdictional or prudential rule need not be resolved here, because even if the rule were prudential, it would be adhered to in this case. Pp. 532–533.

3. Also improperly before this Court is petitioners' claim that the ordinance constitutes a regulatory taking. The regulatory taking claim is ripe for review; and the fact that it was not raised below does not mean that it could not be properly raised before this Court, since once petitioners properly raised a taking claim, they could have formulated, in this Court, any argument they liked in support of that claim. Nonetheless, the claim will not be considered because, under this Court's Rule 14.1(a), only questions set forth, or fairly included, in the petition for certiorari are considered. Rule 14.1(a) is prudential, but is disregarded only where reasons of urgency or economy suggest the need to address the unpresented question in the case under consideration. The Rule provides the respondent with notice of the grounds on which certiorari is sought, thus relieving him of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions. It also assists the Court in selecting the cases in which certiorari

Syllabus

will be granted. By forcing the parties to focus on the questions the Court views as particularly important, the Rule enables the Court to use its resources efficiently. Petitioners' question presented was whether the lower court erred in finding no physical taking, and the regulatory taking claim is related to, but not fairly included in, that question. Thus, petitioners must overcome the very heavy presumption against consideration of the regulatory taking claim, which they have not done. While that claim is important, lower courts have not reached conflicting results on the claim as they have on the physical taking claim. Prudence also dictates awaiting a case in which the issue was fully litigated below, to have the benefit of developed arguments and lower court opinions squarely addressing the question. Thus, the regulatory taking issue should be left for the California courts to address in the first instance. Pp. 533–538.

224 Cal. App. 3d 1349, 274 Cal. Rptr. 551, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined. BLACKMUN, J., *post*, p. 539, and SOUTER, J., *post*, p. 539, filed opinions concurring in the judgment.

Robert J. Jagiello argued the cause for petitioners. With him on the briefs was *Robert H. Bork*.

Carter G. Phillips argued the cause for respondent. With him on the brief were *Rex E. Lee*, *Donald R. Lincoln*, *Linda B. Reich*, *David R. Chapman*, and *Jeffrey R. Epp*.*

---

*Briefs of *amici curiae* urging reversal were filed for Action in Santa Monica by *Brenda Powers Barnes*; for the Apartment Association of Greater Los Angeles by *Stephen L. Jones*; for the California Association of Realtors et al. by *John E. Mueller*, *Marguerite Mary Leoni*, *Laurene K. Janik* and *William M. Pfeiffer*; for the Florida Manufactured Housing Association, Inc., by *Jack M. Skelding, Jr.*; for the Institute of Real Estate Management of the National Association of Realtors by *Jonathan T. Howe*, *Terrence Hutton*, and *Henry M. Schaffer*; for the Manufactured Housing Educational Trusts of Los Angeles County, California, et al. by *Jerrold A. Fadem*, *George Kimball*, *Charles S. Treat*, and *Kim N. A. Richards*; for the Manufactured Housing Educational Trust of Santa Clara County by *Robert K. Best*; for the Pacific Legal Foundation by *Ronald A. Zumbrun*, *Edward J. Connor, Jr.*, and *Timothy A. Bittle*; for the Rent Stabilization Association of New York City, Inc., et al. by *Erwin N. Griswold* and *Stephen J. Goodman*; for the Washington Legal Foundation et al. by *Daniel*

JUSTICE O'CONNOR delivered the opinion of the Court.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See, *e. g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 426 (1982). But where the government merely regulates the use of property, compensation

---

J. Popeo, Paul D. Kamenar, and *Jonathan K. Van Patten;* and for the Western Mobilehome Association by *Michael A. Willemsen* and *David Spangenberg.*

Briefs of *amici curiae* urging affirmance were filed for the city of San Jose et al. by *Joan R. Gallo, George Rios, Manuela Albuquerque, Stanley C. Hatch, Glenn R. Watson, William Camil, Lynn R. McDougal, Scott H. Howard, David J. Erwin, Robert L. Kress, Charles J. Williams, David H. Hirsch, Steven F. Nord, Marc G. Hynes, John L. Cook, Daniel S. Hentschke, Gary L. Gillig, Jean Leonard Harris, David E. Schricker, Michael F. Dean, James Penman, Peter D. Bulens, John W. Witt, Louise H. Renne, James P. Botz, Mark G. Sellers, Robert B. Ewing, Angil P. Morris, James G. Rourke,* and *Thomas Haas;* for the American Association of Retired Persons by *Steven S. Zalesnick* and *Joan Wise;* for the city of Santa Monica et al. by *Robert M. Myers, Joseph Lawrence, Martin Tachiki, Barry Rosenbaum, David Pettit, Karl M. Manheim,* and *Shane Stark;* for the Golden State Mobilhome Owners League, Inc., et al. by *Fran M. Layton, Joseph L. Sax,* and *Bruce E. Stanton;* for the International City/County Management Association et al. by *Richard Ruda, Andrew G. Schultz, Edward Ricco, Charles K. Purcell,* and *James P. Bieg;* for the National Trust for Historic Preservation in the United States et al. by *Lloyd N. Cutler, Louis R. Cohen, David R. Johnson, Jerold S. Kayden,* and *Elizabeth S. Merritt;* and for the New Jersey Department of the Public Advocate by *David Ben-Asher.*

Briefs of *amici curiae* were filed for the Arizona Mobile Housing Association, Inc., by *Michael A. Parham;* for the California Mobile Home Parkowners Alliance by *Michael M. Berger* and *Joel G. Hirsch;* for the Escondido Mobilehome Owners' Positive Action Committee by *Richard I. Singer* and *Elvi J. Olesen;* and for the Manufactured Housing Association in New Jersey, Inc., by *Christopher J. Hanlon* and *Henry N. Portner.*

is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, *e. g.*, *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 123–125 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

Petitioners own mobile home parks in Escondido, California. They contend that a local rent control ordinance, when viewed against the backdrop of California's Mobilehome Residency Law, amounts to a physical occupation of their property, entitling them to compensation under the first category of cases discussed above.

I

The term "mobile home" is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved. Hirsch & Hirsch, Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol, 35 UCLA L. Rev. 399, 405 (1988). A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping. When the mobile home owner wishes to move, the mobile home is usually sold in place, and the purchaser continues to rent the pad on which the mobile home is located.

In 1978, California enacted its Mobilehome Residency Law, Cal. Civ. Code Ann. § 798 (West 1982 and Supp. 1991). The legislature found "that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter." § 798.55(a).

The Mobilehome Residency Law limits the bases upon which a park owner may terminate a mobile home owner's tenancy. These include the nonpayment of rent, the mobile home owner's violation of law or park rules, and the park owner's desire to change the use of his land. § 798.56. While a rental agreement is in effect, however, the park owner generally may not require the removal of a mobile home when it is sold. § 798.73. The park owner may neither charge a transfer fee for the sale, § 798.72, nor disapprove of the purchaser, provided that the purchaser has the ability to pay the rent, § 798.74. The Mobilehome Residency Law contains a number of other detailed provisions, but none limit the rent the park owner may charge.

In the wake of the Mobilehome Residency Law, various communities in California adopted mobile home rent control ordinances. See Hirsch & Hirsch, *supra*, at 408–411. The voters of Escondido did the same in 1988 by approving Proposition K, the rent control ordinance challenged here. The ordinance sets rents back to their 1986 levels and prohibits rent increases without the approval of the city council. Park owners may apply to the council for rent increases at any time. The council must approve any increases it determines to be "just, fair and reasonable," after considering the following nonexclusive list of factors: (1) changes in the Consumer Price Index; (2) the rent charged for comparable mobile home pads in Escondido; (3) the length of time since

the last rent increase; (4) the cost of any capital improvements related to the pad or pads at issue; (5) changes in property taxes; (6) changes in any rent paid by the park owner for the land; (7) changes in utility charges; (8) changes in operating and maintenance expenses; (9) the need for repairs other than for ordinary wear and tear; (10) the amount and quality of services provided to the affected tenant; and (11) any lawful existing lease. Ordinance § 4(g), App. 11–12.

Petitioners John and Irene Yee own the Friendly Hills and Sunset Terrace Mobile Home Parks, both of which are located in the city of Escondido. A few months after the adoption of Escondido's rent control ordinance, they filed suit in San Diego County Superior Court. According to the complaint, "[t]he rent control law has had the effect of depriving the plaintiffs of all use and occupancy of [their] real property and granting to the tenants of mobilehomes presently in The Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff." *Id.*, at 3, ¶ 6. The Yees requested damages of $6 million, a declaration that the rent control ordinance is unconstitutional, and an injunction barring the ordinance's enforcement. *Id.*, at 5–6.

In their opposition to the city's demurrer, the Yees relied almost entirely on *Hall* v. *Santa Barbara*, 833 F. 2d 1270 (CA9 1987), cert. denied, 485 U. S. 940 (1988), which had held that a similar mobile home rent control ordinance effected a physical taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982). The Yees candidly admitted that "in fact, the *Hall* decision was used [as] a guide in drafting the present Complaint." 2 Tr. 318, Points & Authorities in Opposition to Demurrer 4. The Superior Court nevertheless sustained the city's demurrer and dismissed the Yees' complaint. App. to Pet. for Cert. C–42.

The Yees were not alone. Eleven other park owners filed similar suits against the city shortly afterwards, and all were

dismissed. By stipulation, all 12 cases were consolidated for appeal; the parties agreed that all would be submitted for decision by the California Court of Appeal on the briefs and oral argument in the *Yee* case.

The Court of Appeal affirmed, in an opinion primarily devoted to expressing the court's disagreement with the reasoning of *Hall*. The court concluded: "*Loretto* in no way suggests that the Escondido ordinance authorizes a permanent physical occupation of the landlord's property and therefore constitutes a per se taking." 224 Cal. App. 3d 1349, 1358, 274 Cal. Rptr. 551, 557 (1990). The California Supreme Court denied review. App. to Pet. for Cert. B–41.

Eight of the twelve park owners, including the Yees, joined in a petition for certiorari. We granted certiorari, 502 U. S. 905 (1991), to resolve the conflict between the decision below and those of two of the Federal Courts of Appeals, in *Hall*, *supra*, and *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Board*, 898 F. 2d 347 (CA3 1990).

II

Petitioners do not claim that the ordinary rent control statutes regulating housing throughout the country violate the Takings Clause. Brief for Petitioners 7, 10. Cf. *Pennell* v. *San Jose*, 485 U. S. 1, 12, n. 6 (1988); *Loretto*, *supra*, at 440. Instead, their argument is predicated on the unusual economic relationship between park owners and mobile home owners. Park owners may no longer set rents or decide who their tenants will be. As a result, according to petitioners, any reduction in the rent for a mobile home pad causes a corresponding increase in the value of a mobile home, because the mobile home owner now owns, in addition to a mobile home, the right to occupy a pad at a rent below the value that would be set by the free market. Cf. Hirsch & Hirsch, 35 UCLA L. Rev., at 425. Because under the California Mobilehome Residency Law the park owner cannot evict a mo-

bile home owner or easily convert the property to other uses, the argument goes, the mobile home owner is effectively a perpetual tenant of the park, and the increase in the mobile home's value thus represents the right to occupy a pad at below-market rent indefinitely. And because the Mobilehome Residency Law permits the mobile home owner to sell the mobile home in place, the mobile home owner can receive a premium from the purchaser corresponding to this increase in value. The amount of this premium is not limited by the Mobilehome Residency Law or the Escondido ordinance. As a result, petitioners conclude, the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner. Petitioners contend that what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land.

This argument, while perhaps within the scope of our regulatory taking cases, cannot be squared easily with our cases on physical takings. The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." *FCC* v. *Florida Power Corp.*, 480 U. S. 245, 252 (1987). Thus whether the government floods a landowner's property, *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (1872), or does no more than require the landowner to suffer the installation of a cable, *Loretto, supra,* the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their prop-

erty to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice. Cal. Civ. Code Ann. § 798.56(g). Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government. See *Florida Power*, *supra*, at 252–253. While the "right to exclude" is doubtless, as petitioners assert, "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979), we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance.

Petitioners suggest that the statutory procedure for changing the use of a mobile home park is in practice "a kind of gauntlet," in that they are not in fact free to change the use of their land. Reply Brief for Petitioners 10, n. 16. Because petitioners do not claim to have run that gauntlet, however, this case provides no occasion to consider how the procedure has been applied to petitioners' property, and we accordingly confine ourselves to the face of the statute. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 493–495 (1987). A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy. See *Florida Power*, *supra*, at 251–252, n. 6; see also *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 831–832 (1987); *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U. S. 875, 877 (1983) (REHNQUIST, J., dissenting).

On their face, the state and local laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant. "This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant rela-

tionship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U. S., at 440. See also *Florida Power*, *supra*, at 252 ("statutes regulating the economic relations of landlords and tenants are not *per se* takings"). When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, see, *e. g.*, *Pennell*, *supra*, at 12, n. 6, or require the landowner to accept tenants he does not like, see, *e. g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 261 (1964), without automatically having to pay compensation. See also *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 82–84 (1980). Such forms of regulation are analyzed by engaging in the "essentially ad hoc, factual inquiries" necessary to determine whether a regulatory taking has occurred. *Kaiser Aetna*, *supra*, at 175. In the words of Justice Holmes, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

Petitioners emphasize that the ordinance transfers wealth from park owners to incumbent mobile home owners. Other forms of land use regulation, however, can also be said to transfer wealth from the one who is regulated to another. Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments, although it does not cause a one-time transfer of value as occurs with mobile homes. Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise. The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more *visible* than in the ordinary case, see Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 741, 758–759 (1988), but the exist-

ence of the transfer in itself does not convert regulation into physical invasion.

Petitioners also rely heavily on their allegation that the ordinance benefits incumbent mobile home owners without benefiting future mobile home owners, who will be forced to purchase mobile homes at premiums. Mobile homes, like motor vehicles, ordinarily decline in value with age. But the effect of the rent control ordinance, coupled with the restrictions on the park owner's freedom to reject new tenants, is to increase significantly the value of the mobile home. This increased value normally benefits only the tenant in possession at the time the rent control is imposed. See Hirsch & Hirsch, 35 UCLA L. Rev., at 430–431. Petitioners are correct in citing the existence of this premium as a difference between the alleged effect of the Escondido ordinance and that of an ordinary apartment rent control statute. Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. See *Nollan* v. *California Coastal Comm'n*, *supra*, at 834–835. But it has nothing to do with whether the ordinance causes a *physical* taking. Whether the ordinance benefits only current mobile home owners or all mobile home owners, it does not require petitioners to submit to the physical occupation of their land.

The same may be said of petitioners' contention that the ordinance amounts to compelled physical occupation because it deprives petitioners of the ability to choose their incoming

tenants.* Again, this effect may be relevant to a regulatory taking argument, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners that should "be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons." *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 124. But it does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S., at 261; see also *id.*, at 259 ("[A]ppellant has no 'right' to select its guests as it sees fit, free from governmental regulation"); *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 82–84.

Petitioners' final line of argument rests on a footnote in *Loretto*, in which we rejected the contention that "the landlord could avoid the requirements of [the statute forcing her to permit cable to be permanently placed on her property] by ceasing to rent the building to tenants." We found this possibility insufficient to defeat a physical taking claim, because "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U. S., at 439, n. 17. Petitioners argue that if they have to leave the mobile home park business in order to avoid the strictures of the Escondido

*Strictly speaking, the Escondido rent control ordinance only limits rents. Petitioners' inability to select their incoming tenants is a product of the State's Mobilehome Residency Law, the constitutionality of which has never been at issue in this case. (The State, moreover, has never been a party.) But we understand petitioners to be making a more subtle argument—that before the adoption of the ordinance they were able to influence a mobile home owner's selection of a purchaser by threatening to increase the rent for prospective purchasers they disfavored. To the extent the rent control ordinance deprives petitioners of this type of influence, petitioners' argument is one we must consider.

ordinance, their ability to rent their property has in fact been conditioned on such a forfeiture. This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited. Had the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right. Cf. *Nollan* v. *California Coastal Comm'n*, 483 U. S., at 837. But because the ordinance does not effect a physical taking in the first place, this footnote in *Loretto* does not help petitioners.

With respect to physical takings, then, this case is not far removed from *FCC* v. *Florida Power Corp.*, 480 U. S. 245 (1987), in which the respondent had voluntarily leased space on its utility poles to a cable television company for the installation of cables. The Federal Government, exercising its statutory authority to regulate pole attachment agreements, substantially reduced the annual rent. We rejected the respondent's claim that "it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79." *Id.*, at 252. We explained that "it is the invitation, not the rent, that makes the difference. The line which separates [this case] from *Loretto* is the unambiguous distinction between a . . . lessee and an interloper with a government license." *Id.*, at 252–253. The distinction is equally unambiguous here. The Escondido rent control ordinance, even considered against the backdrop of California's Mobilehome Residency Law, does not authorize an unwanted physical occupation of petitioners' property. It is a regulation of petitioners' *use* of their property, and thus does not amount to a *per se* taking.

III

In this Court, petitioners attempt to challenge the ordinance on two additional grounds: They argue that it constitutes a denial of substantive due process and a regulatory

taking. Neither of these claims is properly before us. The first was not raised or addressed below, and the second is not fairly included in the question on which we granted certiorari.

A

The Yees did not include a due process claim in their complaint. Nor did petitioners raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. See *People* v. *Triggs*, 8 Cal. 3d 884, 890–891, 506 P. 2d 232, 236 (1973). In short, petitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

In reviewing the judgments of state courts under the jurisdictional grant of 28 U. S. C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Illinois* v. *Gates*, 462 U. S. 213, 218–220 (1983). While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, *e. g.*, *Carlson* v. *Green*, 446 U. S. 14, 17, n. 2 (1980).) Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

B

As a preliminary matter, we must address respondent's assertion that a regulatory taking claim is unripe because petitioners have not sought rent increases. While respondent is correct that a claim that the ordinance effects a regula-

tory taking *as applied* to petitioners' property would be unripe for this reason, see *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 186–197 (1985), petitioners mount a *facial* challenge to the ordinance. They allege in this Court that the ordinance does not "'substantially advance'" a "'legitimate state interest'" no matter how it is applied. See *Nollan* v. *California Coastal Comm'n*, *supra*, at 834; *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980). As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S., at 495; *Agins*, *supra*, at 260.

We must also reject respondent's contention that the regulatory taking argument is not properly before us because it was not made below. It *is* unclear whether petitioners made this argument below: Portions of their complaint and briefing can be read either to argue a regulatory taking or to support their physical taking argument. For the same reason it is equally ambiguous whether the Court of Appeal addressed the issue. Yet petitioners' regulatory taking argument stands in a posture different from their substantive due process claim.

Petitioners unquestionably raised a taking claim in the state courts. The question whether the rent control ordinance took their property without compensation, in violation of the Fifth Amendment's Takings Clause, is thus properly before us. Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 78, n. 2 (1988); *Gates*, *supra*, at 219–220; *Dewey* v. *Des Moines*, 173 U. S. 193, 197–198 (1899). Petitioners' arguments that the ordinance constitutes a taking in two differ-

ent ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. While we have on occasion rephrased the question presented by a petitioner, see, *e. g.*, *Ankenbrandt* v. *Richards*, 502 U. S. 1023 (1992), or requested the parties to address an important question of law not raised in the petition for certiorari, see, *e. g.*, *Payne* v. *Tennessee*, 498 U. S. 1080 (1991), by and large it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit.

The framing of the question presented has significant consequences, however, because under this Court's Rule 14.1(a), "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." While "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein," *ibid.*, we ordinarily do not consider questions outside those presented in the petition for certiorari. See, *e. g.*, *Berkemer* v. *McCarty*, 468 U. S. 420, 443, n. 38 (1984). This rule is prudential in nature, but we disregard it "only in the most exceptional cases," *Stone* v. *Powell*, 428 U. S. 465, 481, n. 15 (1976), where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration.

Rule 14.1(a) serves two important and related purposes. First, it provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables

the respondent to sharpen the arguments as to why certiorari should not be granted. Were we routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review. Where, as is not unusual, the decision below involves issues on which the petitioner does *not* seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions.

Second, Rule 14.1(a) assists the Court in selecting the cases in which certiorari will be granted. Last Term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits. To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions. Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources.

We granted certiorari on a single question pertaining to the Takings Clause: "Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute[s] an impermissible taking. Was it error for the state appellate court to disregard the rulings and

hold that there was no taking under the fifth and fourteenth amendments?" This was the question presented by petitioners. Pet. for Cert. i. It asks whether the court below erred in disagreeing with the holdings of the Courts of Appeals for the Third and Ninth Circuits in *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Board*, 898 F. 2d 347 (CA3 1990), and *Hall* v. *Santa Barbara*, 833 F. 2d 1270 (CA9 1987), cert. denied, 485 U. S. 940 (1988). These cases, in turn, held that mobile home ordinances effected physical takings, not regulatory takings. Fairly construed, then, petitioners' question presented is the equivalent of the question "Did the court below err in finding no physical taking?"

Whether or not the ordinance effects a regulatory taking is a question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented, but it is not "fairly included therein." Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well; neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both—Was there a taking?—but they exist side by side, neither encompassing the other. Cf. *American Nat. Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U. S. 606, 608 (1985) (question whether complaint adequately alleges conduct of racketeering enterprise is not fairly included in question whether statute requires that plaintiff suffer damages through defendant's conduct of such an enterprise).

Rule 14.1(a) accordingly creates a heavy presumption against our consideration of petitioners' claim that the ordinance causes a regulatory taking. Petitioners have not overcome that presumption. While the regulatory taking question is no doubt important, from an institutional perspective it is not as important as the physical taking question. The lower courts have not reached conflicting results, so far as we know, on whether similar mobile home rent

control ordinances effect regulatory takings. They *have* reached conflicting results over whether such ordinances cause physical takings; such a conflict is, of course, a substantial reason for granting certiorari under this Court's Rule 10. Moreover, the conflict is between two courts whose jurisdiction includes California, the State with the largest population and one with a relatively high percentage of the Nation's mobile homes. Forum shopping is thus of particular concern. See *Azul Pacifico, Inc.* v. *Los Angeles*, 948 F. 2d 575, 579 (CA9 1991) (mobile home park owners may file physical taking suits in either state or federal court). Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. See *Lytle* v. *Household Mfg., Inc.*, 494 U. S. 545, 552, n. 3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion"). In fact, were we to address the issue here, we would apparently be the first court in the Nation to determine whether an ordinance like this one effects a regulatory taking. We will accordingly follow Rule 14.1(a), and consider only the question petitioners raised in seeking certiorari. We leave the regulatory taking issue for the California courts to address in the first instance.

IV

We made this observation in *Loretto:*

> "Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's

broad power to impose appropriate restrictions upon an owner's *use* of his property." 458 U. S., at 441.

We respected this distinction again in *Florida Power*, where we held that no taking occurs under *Loretto* when a tenant invited to lease at one rent remains at a lower regulated rent. *Florida Power*, 480 U. S., at 252–253. We continue to observe the distinction today. Because the Escondido rent control ordinance does not compel a landowner to suffer the physical occupation of his property, it does not effect a *per se* taking under *Loretto*. The judgment of the Court of Appeal is accordingly

Affirmed.

JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court that the Escondido ordinance is not a taking under this Court's analysis in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982). I also conclude that the substantive due process and regulatory taking claims are not properly raised in this Court. For that reason, I, unlike the Court, do not decide whether the regulatory taking claim is or is not ripe, or which of petitioners' arguments would or would not be relevant to such a claim.

JUSTICE SOUTER, concurring in the judgment.

I concur in the judgment and would join the Court's opinion except for its references to the relevance and significance of petitioners' allegations to a claim of regulatory taking.

Syllabus

JACOBSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90–1124. Argued November 6, 1991—Decided April 6, 1992

At a time when federal law permitted such conduct, petitioner Jacobson ordered and received from a bookstore two Bare Boys magazines containing photographs of nude preteen and teenage boys. Subsequently, the Child Protection Act of 1984 made illegal the receipt through the mails of sexually explicit depictions of children. After finding Jacobson's name on the bookstore mailing list, two Government agencies sent mail to him through five fictitious organizations and a bogus pen pal, to explore his willingness to break the law. Many of those organizations represented that they were founded to protect and promote sexual freedom and freedom of choice and that they promoted lobbying efforts through catalog sales. Some mailings raised the spectre of censorship. Jacobson responded to some of the correspondence. After 2½ years on the Government mailing list, Jacobson was solicited to order child pornography. He answered a letter that described concern about child pornography as hysterical nonsense and decried international censorship, and then received a catalog and ordered a magazine depicting young boys engaged in sexual activities. He was arrested after a controlled delivery of a photocopy of the magazine, but a search of his house revealed no materials other than those sent by the Government and the Bare Boys magazines. At his jury trial, he pleaded entrapment and testified that he had been curious to know the type of sexual actions to which the last letter referred and that he had been shocked by the Bare Boys magazines because he had not expected to receive photographs of minors. He was convicted, and the Court of Appeals affirmed.

Held: The prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that Jacobson was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails. In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells* v. *United States*, 287 U. S. 435, 442. Jacobson was not simply offered the opportunity to order pornography, after which he promptly availed himself of that opportunity. He was the target of 26 months of repeated Government mailings and communications,

Syllabus

and the Government has failed to carry its burden of proving predisposition independent of its attention. The preinvestigation evidence—the Bare Boys magazines—merely indicates a generic inclination to act within a broad range, not all of which is criminal. Furthermore, Jacobson was acting within the law when he received the magazines, and he testified that he did not know that they would depict minors. As for the evidence gathered during the investigation, Jacobson's responses to the many communications prior to the criminal act were at most indicative of certain personal inclinations and would not support the inference that Jacobson was predisposed to violate the Child Protection Act. On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited Jacobson's interest in material banned by law but also exerted substantial pressure on him to obtain and read such material as part of the fight against censorship and the infringement of individual rights. Thus, rational jurors could not find beyond a reasonable doubt that Jacobson possessed the requisite predisposition before the Government's investigation and that it existed independent of the Government's many and varied approaches to him. Pp. 548–554.

916 F. 2d 467, reversed.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, and in which SCALIA, J., joined except as to Part II, *post*, p. 554.

George H. Moyer, Jr., argued the cause and filed briefs for petitioner.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson*, and *Vicki S. Marani*.*

**Bennett L. Gershman, Steven R. Shapiro*, and *John A. Powell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Gregory U. Evans, Daniel B. Hales, George D. Webster, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt, Bernard J. Farber, and *James P.*

JUSTICE WHITE delivered the opinion of the Court.

On September 24, 1987, petitioner Keith Jacobson was indicted for violating a provision of the Child Protection Act of 1984 (Act), Pub. L. 98–292, 98 Stat. 204, which criminalizes the knowing receipt through the mails of a "visual depiction [that] involves the use of a minor engaging in sexually explicit conduct . . . ." 18 U. S. C. § 2252(a)(2)(A). Petitioner defended on the ground that the Government entrapped him into committing the crime through a series of communications from undercover agents that spanned the 26 months preceding his arrest. Petitioner was found guilty after a jury trial. The Court of Appeals affirmed his conviction, holding that the Government had carried its burden of proving beyond reasonable doubt that petitioner was predisposed to break the law and hence was not entrapped.

Because the Government overstepped the line between setting a trap for the "unwary innocent" and the "unwary criminal," *Sherman* v. *United States*, 356 U. S. 369, 372 (1958), and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested, we reverse the Court of Appeals' judgment affirming his conviction.

I

In February 1984, petitioner, a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore. The magazines, entitled Bare Boys I and Bare Boys II, contained photographs of nude preteen and

---

Manak filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Center for Missing and Exploited Children et al. by *H. Robert Showers* and *Judith Drazen Schretter;* and for Congressman Thomas J. Bliley, Jr., et al. by *James P. Mueller, Michael J. Lockerby,* and *David E. Anderson.*

teenage boys. The contents of the magazines startled petitioner, who testified that he had expected to receive photographs of "young men 18 years or older." Tr. 425. On cross-examination, he explained his response to the magazines:

> "[PROSECUTOR]: [Y]ou were shocked and surprised that there were pictures of very young boys without clothes on, is that correct?
>
> "[JACOBSON]: Yes, I was.
>
> "[PROSECUTOR]: Were you offended?
>
> . . . . . .
>
> "[JACOBSON]: I was not offended because I thought these were a nudist type publication. Many of the pictures were out in a rural or outdoor setting. There was—I didn't draw any sexual connotation or connection with that." *Id.*, at 463.

The young men depicted in the magazines were not engaged in sexual activity, and petitioner's receipt of the magazines was legal under both federal and Nebraska law. Within three months, the law with respect to child pornography changed; Congress passed the Act illegalizing the receipt through the mails of sexually explicit depictions of children. In the very month that the new provision became law, postal inspectors found petitioner's name on the mailing list of the California bookstore that had mailed him Bare Boys I and II. There followed over the next 2½ years repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new law by ordering sexually explicit photographs of children through the mail.

The Government began its efforts in January 1985 when a postal inspector sent petitioner a letter supposedly from the American Hedonist Society, which in fact was a fictitious organization. The letter included a membership application and stated the Society's doctrine: that members had the

"right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality." Record, Government Exhibit 7. Petitioner enrolled in the organization and returned a sexual attitude questionnaire that asked him to rank on a scale of one to four his enjoyment of various sexual materials, with one being "really enjoy," two being "enjoy," three being "somewhat enjoy," and four being "do not enjoy." Petitioner ranked the entry "[p]re-teen sex" as a two, but indicated that he was opposed to pedophilia. *Ibid.*

For a time, the Government left petitioner alone. But then a new "prohibited mailing specialist" in the Postal Service found petitioner's name in a file, Tr. 328–331, and in May 1986, petitioner received a solicitation from a second fictitious consumer research company, "Midlands Data Research," seeking a response from those who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite *[sic]* age." Record, Government Exhibit 8. The letter never explained whether "neophite" referred to minors or young adults. Petitioner responded: "Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential." *Ibid.*

Petitioner then heard from yet another Government creation, "Heartland Institute for a New Tomorrow" (HINT), which proclaimed that it was "an organization founded to protect and promote sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting *your* sexual freedom should be rescinded through the legislative process." *Id.*, Defendant's Exhibit 102. The letter also enclosed a second survey. Petitioner indicated that his interest in "[p]reteen sex-homosexual" material was above average, but not high. In response to another question, petitioner wrote: "Not only sexual expression but freedom of the press is under attack. We must be ever vigilant

to counter attack right wing fundamentalists who are determined to curtail our freedoms." *Id.*, Government Exhibit 9.

HINT replied, portraying itself as a lobbying organization seeking to repeal "all statutes which regulate sexual activities, except those laws which deal with violent behavior, such as rape. HINT is also lobbying to eliminate any legal definition of 'the age of consent.'" *Id.*, Defendant's Exhibit 113. These lobbying efforts were to be funded by sales from a catalog to be published in the future "offering the sale of various items which we believe you will find to be both interesting and stimulating." *Ibid.* HINT also provided computer matching of group members with similar survey responses; and, although petitioner was supplied with a list of potential "pen pals," he did not initiate any correspondence.

Nevertheless, the Government's "prohibited mailing specialist" began writing to petitioner, using the pseudonym "Carl Long." The letters employed a tactic known as "mirroring," which the inspector described as "reflect[ing] whatever the interests are of the person we are writing to." Tr. 342. Petitioner responded at first, indicating that his interest was primarily in "male-male items." Record, Government Exhibit 9A. Inspector "Long" wrote back:

> "My interests too are primarily male-male items. Are you satisfied with the type of VCR tapes available? Personally, I like the amateur stuff better if its *[sic]* well produced as it can get more kinky and also seems more real. I think the actors enjoy it more." *Id.*, Government Exhibit 13.

Petitioner responded:

> "As far as my likes are concerned, I like good looking young guys (in their late teens and early 20's) doing their thing together." *Id.*, Government Exhibit 14.

Petitioner's letters to "Long" made no reference to child pornography. After writing two letters, petitioner discontinued the correspondence.

By March 1987, 34 months had passed since the Government obtained petitioner's name from the mailing list of the California bookstore, and 26 months had passed since the Postal Service had commenced its mailings to petitioner. Although petitioner had responded to surveys and letters, the Government had no evidence that petitioner had ever intentionally possessed or been exposed to child pornography. The Postal Service had not checked petitioner's mail to determine whether he was receiving questionable mailings from persons—other than the Government—involved in the child pornography industry. Tr. 348.

At this point, a second Government agency, the Customs Service, included petitioner in its own child pornography sting, "Operation Borderline," after receiving his name on lists submitted by the Postal Service. *Id.*, at 71–72. Using the name of a fictitious Canadian company called "Produit Outaouais," the Customs Service mailed petitioner a brochure advertising photographs of young boys engaging in sex. Record, Government Exhibit 22. Petitioner placed an order that was never filled. *Id.*, Government Exhibit 24.

The Postal Service also continued its efforts in the Jacobson case, writing to petitioner as the "Far Eastern Trading Company Ltd." The letter began:

> "As many of you know, much hysterical nonsense has appeared in the American media concerning 'pornography' and what must be done to stop it from coming across your borders. This brief letter does not allow us to give much comments; however, why is your government spending millions of dollars to exercise international censorship while tons of drugs, which makes yours the world's most crime ridden country are passed through easily." *Id.*, Government Exhibit 1.

The letter went on to say:

> "[W]e have devised a method of getting these to you without prying eyes of U. S. Customs seizing your

> mail. . . . After consultations with American solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without authorization of a judge." *Ibid.*

The letter invited petitioner to send for more information. It also asked petitioner to sign an affirmation that he was "not a law enforcement officer or agent of the U. S. Government acting in an undercover capacity for the purpose of entrapping Far Eastern Trading Company, its agents or customers." Petitioner responded. *Ibid.* A catalog was sent, *id.*, Government Exhibit 2, and petitioner ordered Boys Who Love Boys, *id.*, Government Exhibit 3, a pornographic magazine depicting young boys engaged in various sexual activities. Petitioner was arrested after a controlled delivery of a photocopy of the magazine.

When petitioner was asked at trial why he placed such an order, he explained that the Government had succeeded in piquing his curiosity:

> "Well, the statement was made of all the trouble and the hysteria over pornography and I wanted to see what the material was. It didn't describe the—I didn't know for sure what kind of sexual action they were referring to in the Canadian letter." Tr. 427–428.

In petitioner's home, the Government found the Bare Boys magazines and materials that the Government had sent to him in the course of its protracted investigation, but no other materials that would indicate that petitioner collected, or was actively interested in, child pornography.

Petitioner was indicted for violating 18 U. S. C. § 2252(a)(2)(A). The trial court instructed the jury on the petitioner's entrapment defense,[1] petitioner was convicted, and a di-

---

[1] The jury was instructed:

"As mentioned, one of the issues in this case is whether the defendant was entrapped. If the defendant was entrapped he must be found not

vided Court of Appeals for the Eighth Circuit, sitting en banc, affirmed, concluding that "Jacobson was not entrapped as a matter of law." 916 F. 2d 467, 470 (1990). We granted certiorari. 499 U. S. 974 (1991).

II

There can be no dispute about the evils of child pornography or the difficulties that laws and law enforcement have encountered in eliminating it. See generally *Osborne* v. *Ohio*, 495 U. S. 103, 110 (1990); *New York* v. *Ferber*, 458 U. S. 747, 759–760 (1982). Likewise, there can be no dispute that the Government may use undercover agents to enforce the law. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells* v. *United States*, 287 U. S. 435, 441 (1932); *Sherman*, 356 U. S., at 372; *United States* v. *Russell*, 411 U. S. 423, 435–436 (1973).

In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells*, *supra*, at 442; *Sherman*, *supra*, at 372. Where the Government has induced an

---

guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

"If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers o[r] their agents to commit that crime, then he was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he was not entrapped even though law-enforcement officers or their agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime." App. 11–12.

individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. *United States* v. *Whoie*, 288 U. S. App. D. C. 261, 263–264, 925 F. 2d 1481, 1483–1484 (1991).[2]

Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs and, if the offer is accepted, make an arrest on the spot or later. In

---

[2] Inducement is not at issue in this case. The Government does not dispute that it induced petitioner to commit the crime. The sole issue is whether the Government carried its burden of proving that petitioner was predisposed to violate the law *before* the Government intervened. The dissent is mistaken in claiming that this is an innovation in entrapment law and in suggesting that the Government's conduct prior to the moment of solicitation is irrelevant. See *post*, at 556–557. The Court rejected these arguments six decades ago in *Sorrells* v. *United States*, 287 U. S. 435 (1932), when the Court wrote that the Government may not punish an individual "for an alleged offense which is the product of the creative activity of its own officials" and that in such a case the Government "is in no position to object to evidence of the activities of its representatives in relation to the accused . . . ." *Id.*, at 451. Indeed, the proposition that the accused must be predisposed prior to contact with law enforcement officers is so firmly established that the Government conceded the point at oral argument, submitting that the evidence it developed during the course of its investigation was probative because it indicated petitioner's state of mind *prior* to the commencement of the Government's investigation. See Tr. of Oral Arg. 41, 49.

This long-established standard in no way encroaches upon Government investigatory activities. Indeed, the Government's internal guidelines for undercover operations provide that an inducement to commit a crime should not be offered unless:

"(a) [T]here is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; *or*

"(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity." Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980), reprinted in S. Rep. No. 97–682, p. 551 (1982).

such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition. See *United States* v. *Sherman*, 200 F. 2d 880, 882 (CA2 1952). Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner—who must be presumed to know the law—had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. *Mathews* v. *United States*, 485 U. S. 58, 66 (1988).

But that is not what happened here. By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner since January 1985. *Sorrells*, *supra*, at 442; *Sherman*, 356 U. S., at 372.

The prosecution's evidence of predisposition falls into two categories: evidence developed prior to the Postal Service's mail campaign, and that developed during the course of the investigation. The sole piece of preinvestigation evidence is petitioner's 1984 order and receipt of the Bare Boys magazines. But this is scant if any proof of petitioner's predisposition to commit an illegal act, the criminal character of which a defendant is presumed to know. It may indicate a predisposition to view sexually oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition.

Furthermore, petitioner was acting within the law at the time he received these magazines. Receipt through the mails of sexually explicit depictions of children for noncommercial use did not become illegal under federal law until May 1984, and Nebraska had no law that forbade petitioner's possession of such material until 1988. Neb. Rev. Stat. § 28–813.01 (1989). Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence. Hence, the fact that petitioner legally ordered and received the Bare Boys magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act. This is particularly true given petitioner's unchallenged testimony that he did not know until they arrived that the magazines would depict minors.

The prosecution's evidence gathered during the investigation also fails to carry the Government's burden. Petitioner's responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails.[3] Furthermore, a person's inclinations and "fantasies . . . are

[3] We do not hold, as the dissent suggests, see *post*, at 559–560, that the Government was required to prove that petitioner knowingly violated the law. We simply conclude that proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing.

his own and beyond the reach of government . . . ." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 67 (1973); *Stanley* v. *Georgia*, 394 U. S. 557, 565–566 (1969).

On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights. For instance, HINT described itself as "an organization founded to protect and promote sexual freedom and freedom of choice" and stated that "the most appropriate means to accomplish [its] objectives is to promote honest dialogue among concerned individuals and to continue its lobbying efforts with State Legislators." Record, Defendant's Exhibit 113. These lobbying efforts were to be financed through catalog sales. *Ibid.* Mailings from the equally fictitious American Hedonist Society, *id.*, Government Exhibit 7, and the correspondence from the nonexistent Carl Long, *id.*, Defendant's Exhibit 5, endorsed these themes.

Similarly, the two solicitations in the spring of 1987 raised the spectre of censorship while suggesting that petitioner ought to be allowed to do what he had been solicited to do. The mailing from the Customs Service referred to "the worldwide ban and intense enforcement on this type of material," observed that "what was legal and commonplace is now an 'underground' and secretive service," and emphasized that "[t]his environment forces us to take extreme measures" to ensure delivery. *Id.*, Government Exhibit 22. The Postal Service solicitation described the concern about child pornography as "hysterical nonsense," decried "international censorship," and assured petitioner, based on consultation with "American solicitors," that an order that had been posted could not be opened for inspection without au-

thorization of a judge. *Id.*, Government Exhibit 1. It further asked petitioner to affirm that he was not a Government agent attempting to entrap the mail order company or its customers. *Ibid.* In these particulars, both Government solicitations suggested that receiving this material was something that petitioner ought to be allowed to do.

Petitioner's ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails. See *Sherman*, 356 U. S., at 374. The evidence that petitioner was ready and willing to commit the offense came only after the Government had devoted 2½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law. Rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner. As was explained in *Sherman*, where entrapment was found as a matter of law, "the Government [may not] pla[y] on the weaknesses of an innocent party and beguil[e] him into committing crimes which he otherwise would not have attempted." *Id.*, at 376.

Law enforcement officials go too far when they "implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells*, 287 U. S., at 442 (emphasis added). Like the *Sorrells* Court, we are "unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.*, at 448. When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if

left to his own devices, likely would have never run afoul of the law, the courts should intervene.

Because we conclude that this is such a case and that the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails, we reverse the Court of Appeals' judgment affirming the conviction of Keith Jacobson.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, and with whom JUSTICE SCALIA joins except as to Part II, dissenting.

Keith Jacobson was offered only two opportunities to buy child pornography through the mail. Both times, he ordered. Both times, he asked for opportunities to buy more. He needed no Government agent to coax, threaten, or persuade him; no one played on his sympathies, friendship, or suggested that his committing the crime would further a greater good. In fact, no Government agent even contacted him face to face. The Government contends that from the enthusiasm with which Mr. Jacobson responded to the chance to commit a crime, a reasonable jury could permissibly infer beyond a reasonable doubt that he was predisposed to commit the crime. I agree. Cf. *United States* v. *Hunt*, 749 F. 2d 1078, 1085 (CA4 1984) (ready response to solicitation shows predisposition), cert. denied, 472 U. S. 1018 (1985); *United States* v. *Kaminski*, 703 F. 2d 1004, 1008 (CA7 1983) ("'the most important factor . . . is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement'") (quoting *United States* v. *Reynoso-Ulloa*, 548 F. 2d 1329, 1336 (CA9 1977), cert. denied, 436 U. S. 926 (1978)); *United States* v. *Sherman*, 200 F. 2d 880, 882 (CA2 1952) (indication of pre-

disposition is a defendant's willingness to commit the offense "'as evinced by ready complaisance'" (citation omitted)).

The first time the Government sent Mr. Jacobson a catalog of illegal materials, he ordered a set of photographs advertised as picturing "young boys in sex action fun." He enclosed the following note with his order: "I received your brochure and decided to place an order. If I like your product, I will order more later." Record, Government Exhibit 24. For reasons undisclosed in the record, Mr. Jacobson's order was never delivered.

The second time the Government sent a catalog of illegal materials, Mr. Jacobson ordered a magazine called "Boys Who Love Boys," described as: "11 year old and 14 year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." *Id.*, Government Exhibit 2. Along with his order, Mr. Jacobson sent the following note: "Will order other items later. I want to be discreet in order to protect you and me." *Id.*, Government Exhibit 3.

Government agents admittedly did not offer Mr. Jacobson the chance to buy child pornography right away. Instead, they first sent questionnaires in order to make sure that he was generally interested in the subject matter. Indeed, a "cold call" in such a business would not only risk rebuff and suspicion, but might also shock and offend the uninitiated, or expose minors to suggestive materials. Cf. *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 748 (1978) (right to be free from offensive material in one's home); 39 U. S. C. § 3010 (regulating the mailing of sexually explicit advertising materials). Mr. Jacobson's responses to the questionnaires gave the investigators reason to think he would be interested in photographs depicting preteen sex.

The Court, however, concludes that a reasonable jury could not have found Mr. Jacobson to be predisposed beyond a reasonable doubt on the basis of his responses to the Government's catalogs, even though it admits that, by that time,

he was predisposed to commit the crime. The Government, the Court holds, failed to provide evidence that Mr. Jacobson's obvious predisposition at the time of the crime "was independent and not the product of the attention that the Government had directed at petitioner." *Ante*, at 550. In so holding, I believe the Court fails to acknowledge the reasonableness of the jury's inference from the evidence, redefines "predisposition," and introduces a new requirement that Government sting operations have a reasonable suspicion of illegal activity before contacting a suspect.

I

This Court has held previously that a defendant's predisposition is to be assessed as of the time the Government agent first suggested the crime, not when the Government agent first became involved. *Sherman* v. *United States*, 356 U. S. 369, 372–376 (1958). See also *United States* v. *Williams*, 705 F. 2d 603, 618, n. 9 (CA2), cert. denied, 464 U. S. 1007 (1983). Until the Government actually makes a suggestion of criminal conduct, it could not be said to have "implant[ed] in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ." *Sorrells* v. *United States*, 287 U. S. 435, 442 (1932). Even in *Sherman* v. *United States*, *supra*, in which the Court held that the defendant had been entrapped as a matter of law, the Government agent had repeatedly and unsuccessfully coaxed the defendant to buy drugs, ultimately succeeding only by playing on the defendant's sympathy. The Court found lack of predisposition based on the Government's numerous unsuccessful attempts to induce the crime, not on the basis of preliminary contacts with the defendant.

Today, the Court holds that Government conduct may be considered to create a predisposition to commit a crime, even before any Government action to induce the commission of the crime. In my view, this holding changes entrapment doctrine. Generally, the inquiry is whether a suspect is pre-

disposed before the Government induces the commission of the crime, not before the Government makes initial contact with him. There is no dispute here that the Government's questionnaires and letters were not sufficient to establish inducement; they did not even suggest that Mr. Jacobson should engage in any illegal activity. If all the Government had done was to send these materials, Mr. Jacobson's entrapment defense would fail. Yet the Court holds that the Government must prove not only that a suspect was predisposed to commit the crime before the opportunity to commit it arose, but also before the Government came on the scene. *Ante*, at 548–549.

The rule that preliminary Government contact can create a predisposition has the potential to be misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant's predisposition *before it ever seeks to contact him.* Surely the Court cannot intend to impose such a requirement, for it would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed. The Court denies that its new rule will affect run-of-the-mill sting operations, *ante*, at 549–550, and one hopes that it means what it says. Nonetheless, after this case, every defendant will claim that something the Government agent did before soliciting the crime "created" a predisposition that was not there before. For example, a bribetaker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. A drug buyer will claim that the description of the drug's purity and effects was so tempting that it created the urge to try it for the first time. In short, the Court's opinion could be read to prohibit the Government from advertising the seductions of criminal activity as part of its sting operation, for fear of creating a predisposition in its suspects. That limitation would be especially likely to

hamper sting operations such as this one, which mimic the advertising done by genuine purveyors of pornography. No doubt the Court would protest that its opinion does not stand for so broad a proposition, but the apparent lack of a principled basis for distinguishing these scenarios exposes a flaw in the more limited rule the Court today adopts.

The Court's rule is all the more troubling because it does not distinguish between Government conduct that merely highlights the temptation of the crime itself, and Government conduct that threatens, coerces, or leads a suspect to commit a crime in order to fulfill some other obligation. For example, in *Sorrells*, the Government agent repeatedly asked for illegal liquor, coaxing the defendant to accede on the ground that "'one former war buddy would get liquor for another.'" 287 U. S., at 440. In *Sherman*, the Government agent played on the defendant's sympathies, pretending to be going through drug withdrawal and begging the defendant to relieve his distress by helping him buy drugs. 356 U. S., at 371.

The Government conduct in this case is not comparable. While the Court states that the Government "exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights," *ante*, at 552, one looks at the record in vain for evidence of such "substantial pressure." The most one finds is letters advocating legislative action to liberalize obscenity laws, letters which could easily be ignored or thrown away. Much later, the Government sent separate mailings of catalogs of illegal materials. Nowhere did the Government suggest that the proceeds of the sale of the illegal materials would be used to support legislative reforms. While one of the HINT letters suggested that lobbying efforts would be funded by sales from a catalog, Record, Defendant's Exhibit 113, the catalogs actually sent, nearly a year later, were from different fictitious entities (Produit Outaouais and Far Eastern Trading Company), and gave no

suggestion that money would be used for any political purposes. *Id.*, Government Exhibit 22, Government Exhibit 2. Nor did the Government claim to be organizing a civil disobedience movement, which would protest the pornography laws by breaking them. Contrary to the gloss given the evidence by the Court, the Government's suggestions of illegality may also have made buyers beware, and increased the mystique of the materials offered: "For those of you who have enjoyed youthful material . . . we have devised a method of getting these to you without prying eyes of U. S. Customs seizing your mail." *Id.*, Government Exhibit 1. Mr. Jacobson's curiosity to see what "'all the trouble and the hysteria'" was about, *ante*, at 547, is certainly susceptible of more than one interpretation. And it is the jury that is charged with the obligation of interpreting it. In sum, the Court fails to construe the evidence in the light most favorable to the Government, and fails to draw all reasonable inferences in the Government's favor. It was surely reasonable for the jury to infer that Mr. Jacobson was predisposed beyond a reasonable doubt, even if other inferences from the evidence were also possible.

II

The second puzzling thing about the Court's opinion is its redefinition of predisposition. The Court acknowledges that "[p]etitioner's responses to the many communications prior to the ultimate criminal act were . . . indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex . . . ." *Ante*, at 551. If true, this should have settled the matter; Mr. Jacobson was predisposed to engage in the illegal conduct. Yet, the Court concludes, "petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails." *Ibid.*

The Court seems to add something new to the burden of proving predisposition. Not only must the Government

show that a defendant was predisposed to engage in the illegal conduct, here, receiving photographs of minors engaged in sex, but also that the defendant was predisposed to break the law knowingly in order to do so. The statute violated here, however, does not require proof of specific intent to break the law; it requires only knowing receipt of visual depictions produced by using minors engaged in sexually explicit conduct. See 18 U. S. C. § 2252(a)(2); *United States* v. *Moncini*, 882 F. 2d 401, 404–406 (CA9 1989). Under the Court's analysis, however, the Government must prove *more* to show predisposition than it need prove in order to convict.

The Court ignores the judgment of Congress that specific intent is not an element of the crime of receiving sexually explicit photographs of minors. The elements of predisposition should track the elements of the crime. The predisposition requirement is meant to eliminate the entrapment defense for those defendants who would have committed the crime anyway, even absent Government inducement. Because a defendant might very well be convicted of the crime here absent Government inducement even though he did not know his conduct was illegal, a specific intent requirement does little to distinguish between those who would commit the crime without the inducement and those who would not. In sum, although the fact that Mr. Jacobson's purchases of Bare Boys I and Bare Boys II were legal at the time may have some relevance to the question of predisposition, it is not, as the Court suggests, dispositive.

The crux of the Court's concern in this case is that the Government went too far and "abused" the "'processes of detection and enforcement'" by luring an innocent person to violate the law. *Ante*, at 553, quoting *Sorrells*, 287 U. S., at 448. Consequently, the Court holds that the Government failed to prove beyond a reasonable doubt that Mr. Jacobson was predisposed to commit the crime. It was, however, the jury's task, as the conscience of the community, to decide whether Mr. Jacobson was a willing participant in the crimi-

nal activity here or an innocent dupe. The jury is the traditional "defense against arbitrary law enforcement." *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968). Indeed, in *Sorrells*, in which the Court was also concerned about overzealous law enforcement, the Court did not decide itself that the Government conduct constituted entrapment, but left the issue to the jury. 287 U. S., at 452. There is no dispute that the jury in this case was fully and accurately instructed on the law of entrapment, and nonetheless found Mr. Jacobson guilty. Because I believe there was sufficient evidence to uphold the jury's verdict, I respectfully dissent.

Per Curiam

TREVINO *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 91–6751. Decided April 6, 1992

Before jury selection began in petitioner Trevino's capital murder trial, he filed a "Motion to Prohibit the State from Using Peremptory Challenges to Strike Members of a Cognizable Group," stating that the prosecution and the State of Texas had historically and habitually used such challenges to strike black people and other minorities. After the State exercised its peremptory challenges to strike the only black members of the venire, the court denied his motion, and he was convicted by an all-white jury and sentenced to death. While Trevino's case was pending on appeal, this Court decided, in *Batson* v. *Kentucky*, 476 U. S. 79, that equal protection is violated where the prosecution uses race based peremptory challenges to exclude members of a defendant's racial group from a jury. The Texas Court of Criminal Appeals affirmed the conviction and sentence, finding, *inter alia*, that Trevino's arguments did not amount to reliance on the Equal Protection Clause.

Held: Trevino is entitled to review under the rule announced in *Batson*. He presented his equal protection claim to the trial court when he relied on a claim of a historical pattern of discriminatory use of peremptory challenges, and preserved that claim on appeal when he included in his argument caption an express reference to the Fourteenth Amendment, presenting for review the very issue he had raised in the trial court. Moreover, the State did not argue that Trevino failed to make an equal protection claim, but rather disputed the legal basis for his claim. To hold that he had forfeited his equal protection claim by failing to state it with sufficient precision would require applying a stricter standard than applied in *Batson* itself. Since Trevino's case is in this Court on direct review, he is entitled to the *Batson* rule.

Certiorari granted; 815 S. W. 2d 592, reversed and remanded.

PER CURIAM.

I

The State of Texas charged petitioner Joe Mario Trevino for the murder and rape of Blanche Miller, a capital offense. On February 1, 1984, before jury selection, petitioner filed a "Motion to Prohibit the State from Using Peremptory Chal-

lenges to Strike Members of a Cognizable Group." The motion recited:

> "The Accused requests of the Court that the State of Texas be prohibited from its use of peremptory challenges to strike prospective jurors merely based on the fact of race. The prosecution, the State of Texas, historically and habitually uses its peremptory challenges to strike black people and other minorities who are otherwise qualified. These peremptory challenges are exercised by the State of Texas to strike prospective black jurors in its effort to produce an ethnically pure, all white, jury. This common use of the State's peremptory challenge in a criminal trial deprives the Accused of due process and a fair trial. This practice deprives the Accused of a jury representing a fair cross-section of the community in violation of the Sixth Amendment to the United States Constitution.
>
> "A hearing is requested on this Motion." 1A Record 280.

The trial court delayed ruling on the motion until the *voir dire*. During the course of *voir dire*, the prosecution exercised its peremptory challenges to excuse the only three black members of the venire. After each of these peremptory strikes, petitioner, who is Hispanic, renewed his motion, asking that the prosecution state its reasons for striking the jurors. The first time petitioner renewed the motion, the court stated: "I know of no requirement yet for either party to announce his reasons for exercising a preemptory *[sic]* challenge. Can you cite me some law on that?" 11 Record 356. In response, petitioner's counsel cited *McCray* v. *Abrams*, 576 F. Supp. 1244 (EDNY), aff'd in part and rev'd in part, 750 F. 2d 1113 (CA2 1984). He went on to note that when we denied the petition for a writ of certiorari in *McCray* v. *New York*, 461 U. S. 961 (1983), five Justices expressed the view that *Swain* v. *Alabama*, 380 U. S. 202

(1965), ought to be reexamined. 11 Record 356. The trial court denied petitioner's motion, and denied it again after two more black venire members were excluded.

The all-white jury returned a verdict of guilty and after a sentencing hearing returned affirmative answers to the two special questions posed by the court. See *Jurek* v. *Texas*, 428 U. S. 262, 267–269 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). As required under such circumstances, see *ibid.*, the trial court sentenced petitioner to death. Petitioner appealed to the Court of Criminal Appeals of Texas, filing his brief on December 19, 1985. This is the cause now before us. He cited 24 errors in the guilt and punishment phases of the trial court proceedings. The only one of concern now is the prosecutor's use of peremptory challenges based on race.

Petitioner contended in the Court of Criminal Appeals that the prosecution's race based use of challenges violated his "rights to due process of law and to an impartial jury fairly drawn from a representative cross section of the community." Brief for Appellant in No. 69337, p. 11. He found these rights in "the Sixth and Fourteenth Amendments to the United States Constitution," as well as provisions of the Texas Constitution. *Ibid.* He asserted he was renewing the objections pressed at trial. *Ibid.* He acknowledged that under *Swain* v. *Alabama*, the use of peremptory challenges to discriminate in a single case would not be an equal protection violation but noted that in *Batson* v. *Kentucky*, cert. granted, 471 U. S. 1052 (1985), we would reconsider the question under the Sixth Amendment. When his brief was filed, we had heard oral argument in *Batson* but had not announced our decision. Petitioner urged that even if *Batson* did not alter the requirement of alleging an overall scheme of discrimination, the Court of Criminal Appeals should prohibit peremptory challenges based on race as a matter of state law.

On April 30, 1986, not long after petitioner filed his brief in the Court of Criminal Appeals, our decision in *Batson* came down. *Batson* v. *Kentucky*, 476 U. S. 79. The case announced the now familiar rule that when a defendant makes a prima facie showing that the State has exercised its peremptory challenges to exclude members of the defendant's racial group, the State bears the burden of coming forward with a race neutral justification. Just over a month after *Batson* was decided, the State filed its brief in the Court of Criminal Appeals. The State argued *Batson* could not avail petitioner because he is not a member of the same race as the excluded jurors. According to the State, petitioner's claim could not be considered an equal protection claim but was instead a claim that he was entitled to a jury composed of a "fair cross-section" of the community. Brief for Appellee in No. 69337, pp. 15–17. In drawing this distinction, the State relied on the view that a criminal defendant does not state an equal protection claim unless he alleges that the excluded jurors are members of the same protected class as he. We rejected this view last Term in *Powers* v. *Ohio*, 499 U. S. 400 (1991).

The Court of Criminal Appeals of Texas, sitting en banc, affirmed petitioner's conviction and sentence on June 12, 1991, and denied petitioner's application for rehearing on September 18, 1991. The opinion of the Court of Criminal Appeals does not set forth the reason for the delay of over five years between the submission of briefs and the resolution of the appeal. With respect to the peremptory challenge question, the court stated that the argument was foreclosed by *Holland* v. *Illinois*, 493 U. S. 474 (1990), in which we held that the Sixth Amendment does not prohibit the prosecution from exercising its peremptory challenges to exclude potential jurors based on race. 815 S. W. 2d 592, 598. In a footnote, the Court of Criminal Appeals stated that the arguments in petitioner's brief did not amount to reliance on the Equal Protection Clause. *Id.*, at 598, n. 3. The court's

opinion cited neither *Powers* nor *Ford* v. *Georgia*, 498 U. S. 411, which we decided on February 19, 1991. We now grant certiorari.

II

In *Ford* v. *Georgia*, we addressed what steps a defendant in a criminal case was required to take to preserve an equal protection objection to the State's race based use of peremptory challenges during the pre-*Batson* era. Here we consider whether petitioner took those steps.

In *Ford*, the petitioner filed a pretrial "Motion to Restrict Racial Use of Peremptory Challenges," 498 U. S., at 413, wording which is in all material respects parallel to the present petitioner's pretrial "Motion to Prohibit the State from Using Peremptory Challenges to Strike Members of a Cognizable Group." The ultimate issue in *Ford* concerned the validity of a state procedural rule, but before reaching it we ruled on a preliminary issue, and that ruling is dispositive here. We stated:

> "The threshold issues are whether and, if so, when petitioner presented the trial court with a cognizable *Batson* claim that the State's exercise of its peremptory challenges rested on the impermissible ground of race in violation of the Equal Protection Clause of the Fourteenth Amendment. We think petitioner must be treated as having raised such a claim, although he certainly failed to do it with the clarity that appropriate citations would have promoted. The pretrial motion made no mention of the Equal Protection Clause, and the later motion for a new trial cited the Sixth Amendment, not the Fourteenth." *Id.*, at 418.

Despite the inartfulness of the *Ford* petitioner's assertion of his rights, we held he had presented his claim to the trial court. We noted that his reference in his motion to exclusion of black jurors "'over a long period of time,'" and his argument to the same effect "could reasonably have been

intended and interpreted to raise a claim under the Equal Protection Clause on the evidentiary theory articulated in *Batson*'s antecedent, *Swain* v. *Alabama*." *Id.*, at 419. We placed this interpretation on the reference to history because the standard of proof for an equal protection violation under *Swain* required a showing of racial exclusion in "case after case." 380 U. S., at 223.

In the matter now before us petitioner also relied on a claim of a historical pattern of discriminatory use of peremptory challenges. That alone would have been sufficient under *Ford* to place the equal protection claim before the trial court. Of course, petitioner did more. He made an express reference to *Swain* in his argument to the trial court. 11 Record 356. In fact, petitioner argued that we would modify *Swain*'s burden of proof and that the Texas courts should anticipate our decision. We decide that petitioner presented his equal protection claim to the trial court.

We determine further that petitioner preserved his equal protection claim before the Court of Criminal Appeals. His argument caption made an express reference to the Fourteenth Amendment, and the issue presented for review was the very one that he had raised before the trial court.

The State in its brief to the Court of Criminal Appeals recognized that petitioner's argument contained an equal protection claim, albeit one which the State believed to lack merit. The State did not argue that petitioner was not making an equal protection claim but that petitioner's equal protection claim had no legal support. Given our later holding in *Powers* v. *Ohio*, *supra*, the State's contention is incorrect.

We cannot ignore the fact that were we to hold petitioner had forfeited his equal protection claim by failing to state it with sufficient precision, we would be applying a stricter standard than applied in *Batson* itself. There petitioner had conceded in the state courts that *Swain* foreclosed a direct equal protection claim, and he based his argument on the Sixth Amendment and a provision of the Kentucky Constitu-

tion. *Batson* v. *Kentucky*, 476 U. S., at 83. Yet we treated his allegation of a violation of the Fourteenth Amendment as sufficient to present the question. *Id.*, at 84–85, n. 4. Because petitioner's case is here on direct review, he is entitled to the rule we announced in *Batson*. Compare *Griffith* v. *Kentucky*, 479 U. S. 314 (1987) (giving retroactive application to *Batson* for cases pending on direct review or not yet final when *Batson* was decided), with *Teague* v. *Lane*, 489 U. S. 288, 296 (1989) (denying similar application for cases on collateral review).

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted, the judgment of the Court of Criminal Appeals of Texas is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES *v.* ALASKA

ON BILL OF COMPLAINT

No. 118, Orig. Argued February 24, 1992—Decided April 21, 1992

Pursuant to, *inter alia*, § 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA), the Secretary of the Army, through the Army Corps of Engineers, granted Nome, Alaska, a federal permit to build port facilities extending into Norton Sound. The permit's issuance was conditioned on the submission by Alaska of a disclaimer of rights to additional submerged lands that it could claim within its boundary if the facilities' construction moved the coastline seaward. However, the disclaimer also provided that Alaska reserved its right to the accreted submerged lands pending a decision by a court of competent jurisdiction that federal officials lacked the authority to compel a disclaimer of sovereignty as a condition of permit issuance. After the facilities were constructed, the United States Department of the Interior proposed a lease sale for minerals in Norton Sound. Alleging that the proposal involved lands subject to its disclaimer, Alaska announced its intention to file suit challenging the Corps' authority to require the disclaimer. The United States was granted leave of this Court to commence this action, and both parties have filed motions for summary judgment.

Held: The Secretary of the Army acted within his discretion in conditioning approval of the Nome port facilities on a disclaimer by Alaska of a change in the federal-state boundary that the project might cause. Pp. 575–593.

(a) This Court's review of the Corps' construction of a statute that it administers involves an examination of § 10's language, this Court's decisions interpreting § 10, and the Corps' longstanding construction in fulfilling Congress' mandate. On its face, § 10—which prohibits the building of any structure in navigable waters of the United States "except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army"—appears to give the Secretary unlimited discretion to grant or deny a permit for construction of a structure such as the one at issue. While both the RHA's legislative history and § 10's statutory antecedents offer little insight into Congress' intent, the idea of delegating authority to the Secretary was well established in the immediate precursors to the RHA. This Court's decisions also support the view that § 10 should be construed broadly, see, *e. g.*, *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, to authorize consideration of factors other than navigation during the permit review process, cf.

Syllabus

United States v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655. In addition, since the late 1960's, the regulations adopted by the Corps have interpreted its statutory authority as empowering it to take into account several "public interest" factors—including a full range of economic, social, and environmental factors—in addition to navigation in deciding whether to issue a § 10 permit. See, *e. g.*, 33 CFR § 320.4(a)(1). Pp. 576–583.

(b) There is no merit to Alaska's argument that any statutory mandate authorizing the Secretary to consider factors in addition to navigation is exceeded by 33 CFR § 320.4(f), which authorizes consideration of a project's consequences on the federal-state boundary. Contrary to Alaska's position, the Corps' practice does not conflict with the Submerged Lands Act (SLA), which provides that a coastal State's boundary extends three miles from its coastline. Although coastlines are subject to change from natural or artificial alterations, see, *e. g.*, *United States* v. *California*, 381 U. S. 139, 176–177 *(California II)*, the Secretary is making no effort to alter a State's existing rights to sovereignty over submerged lands within three miles of the coastline. Rather the Corps is, in a reasonable exercise of its authority, determining whether an artificial addition to the coastline will increase the State's control over submerged lands to the detriment of the United States' legitimate interests. Neither the SLA nor its legislative history addresses the effect of artificial additions to the coastline, and this Court sanctioned, in *California II*, *supra*, at 177, the mechanism exercised by the Secretary in this case. Nor do this Court's decisions prohibit the Secretary from considering in the permit review process changes in federal-state boundaries that will result in the establishment of one boundary for international purposes—since artificial additions always affect such boundaries—and a different one for domestic purposes. Specifically, the Secretary's action does not conflict with *California II*, because that case did not specify a goal of achieving a single domestic and international coastline. Pp. 583–591.

(c) There is also no merit to Alaska's argument that, even if the regulations are valid, they do not authorize the Corps to force a coastal State to abdicate rights to submerged lands as a condition to a permit's issuance. It is untenable to say that the United States' legitimate property interests fall outside the relevant criteria for a decision that requires the Secretary to determine whether a permit's issuance would affect the "public interest." And it would make little sense, and be inconsistent with Congress' intent, to hold that the Corps legitimately may prohibit construction of a port facility, and yet to deny it the authority to seek the less drastic alternative of conditioning the permit's issuance on the State's disclaimer of rights to accreted submerged lands.

The Corps' failure to identify in the regulations the option of conditioning disclaimers does not render the policy contrary to law. See *United States* v. *Gaubert*, 499 U. S. 315, 324. The Corps cannot be said to have acted in an arbitrary and capricious manner, since it notified state officials promptly of the objection to the project, specified a curative option, and afforded Alaska ample time to consider the disclaimer, consult with federal officials, and then draft the disclaimer. Nor can Alaska contend that it lacked notice, since the disclaimer is similar to those Alaska has filed in past § 10 proceedings. Pp. 591–592.

United States' motion for summary judgment granted; Alaska's motion for summary judgment denied.

WHITE, J., delivered the opinion for a unanimous Court.

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Acting Assistant Attorney General Hartman, Edwin S. Kneedler,* and *Michael W. Reed.*

John G. Gissberg, Assistant Attorney General of Alaska, argued the cause for defendant. With him on the briefs were *Charles E. Cole,* Attorney General, and *John P. Griffin,* Assistant Attorney General.*

JUSTICE WHITE delivered the opinion of the Court.

Ever since the Nome gold rush of 1899 to 1901, the Seward Peninsula in western Alaska has been a focus of attempts

---

*A brief of *amici curiae* was filed for the State of Alabama et al. by *David C. Slade, James H. Evans,* Attorney General of Alabama, *Daniel E. Lungren,* Attorney General of California, *Thomas F. Gede,* and Special Assistant Attorney General, *Charles M. Oberly III,* Attorney General of Delaware, *Robert Butterworth,* Attorney General of Florida, *Michael J. Bowers,* Attorney General of Georgia, *Warren Price III,* Attorney General of Hawaii, *William J. Guste, Jr.,* Attorney General of Louisiana, *Scott Harshbarger,* Attorney General of Massachusetts, *Michael C. Moore,* Attorney General of Mississippi, *Robert J. Del Tufo,* Attorney General of New Jersey, *Lacy H. Thornburg,* Attorney General of North Carolina, *Dan Morales,* Attorney General of Texas, *C. C. Harness III, Mary Sue Terry,* Attorney General of Virginia, and *Kenneth Eikenberry,* Attorney General of Washington.

to gain control over the region's natural riches. See *In re McKenzie*, 180 U. S. 536 (1901). The city of Nome sprang to life almost overnight, with some 20,000 gold seekers arriving by vessel in the summer of 1900 when the spring thaw opened up seaward passage. Since that time, Nome has never been linked to interior Alaska by road—travelers and traders must arrive by air, sea, or dog sled. This heavy reliance on seaward traffic, and the lack of a natural port in the region, inspired Nome in the early 1980's to develop plans to construct port facilities, including a causeway with road, a breakwater, and an offshore terminal area, extending into Norton Sound. The implications of this construction for the federal-state offshore boundary lie at the heart of this lawsuit, which comes to us on a bill of complaint filed by the United States. The question presented is whether the Secretary of the Army may decline to issue a permit to build an artificial addition to the coastline unless Alaska agrees that the construction will be deemed not to alter the location of the federal-state boundary.

I

On August 25, 1982, the city of Nome applied for a federal permit to build port facilities with the Alaska District Corps of Engineers of the United States Department of the Army under § 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA), 30 Stat. 1151, 33 U. S. C. § 403, and § 404 of the Clean Water Act, 86 Stat. 884, as amended, 33 U. S. C. § 1344.[1] The Corps issued a Public Notice of Application for Permit on October 20, 1982, and invited interested persons to comment on whether the permit should be granted. On November 22, 1982, a division of the United States Department of the Interior filed an objection to the issuance of a Department of the Army permit on the ground that Nome's construction of these port facilities would cause an "artificial

[1] This recitation of the facts is drawn from the Joint Stipulation of Facts filed with the Court on September 6, 1991.

accretion to the legal coast line." Joint Stipulation of Facts 2. It requested that the Corps require Alaska to waive any future claims pursuant to the Submerged Lands Act (SLA), 67 Stat. 29, as amended, 43 U. S. C. § 1301 *et seq.*, that might arise from a seaward extension of Alaska's coastline caused by the building of these facilities. The Solicitor of the Interior Department issued an opinion to the same effect, stating that the Nome project would "'move Alaska's coastline or baseline seaward of its present location'" and that "'[f]ederal mineral leasing offshore Alaska would be affected because the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline.'" Joint Stipulation of Facts 2–3. Accordingly, the Solicitor recommended that "'approval of the permit application be conditioned upon Alaska executing an agreement or a quit claim deed preserving the coastline and the state-federal boundary.'" *Id.*, at 3.

On July 1, 1983, the Corps transmitted the Solicitor's letter to the Alaska Department of Natural Resources and advised the State that the federal permit would not be issued until a "'waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary.'" *Ibid.* The Alaska Department of Natural Resources responded on May 9, 1984, by submitting a conditional disclaimer of rights to additional submerged lands that could be claimed by the State as a result of the construction of the Nome port facility. This disclaimer provided that Alaska reserved its right to the accreted submerged lands pending a decision by a court of competent jurisdiction that the federal officials lacked the authority to compel a disclaimer of sovereignty as a condition of permit issuance.[2] After being advised by the De-

---

[2] This disclaimer provides in pertinent part:

"1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a bind-

partment of Justice that this disclaimer was satisfactory, the Corps completed the permitting process and issued the permit.[3]

On March 11, 1988, the Minerals Management Service of the Interior Department published a "Request for Comments and Nominations for a Lease Sale in Norton Sound and Notice of Intent to Prepare an Environmental Impact Statement," which solicited public comment on the Minerals Management Service's proposed lease sale for minerals, such as gold, near Nome in Norton Sound. *Id.*, at 5. Alaska submitted comments the following month, alleging that the proposed Norton Sound Lease Sale involved submerged lands subject to its Nome project disclaimer and announcing its intention to file a suit challenging the Corps' authority to

---

ing disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

"2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Attorney General and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coast line, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

"3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

"4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." Joint Stipulation of Facts 3–4.

[3] The Department of the Army permit was later modified to reflect changes in the project. See *id.*, at 5. These changes are not relevant to the legal issues presented in this case.

require a waiver of rights to submerged lands. The State requested that the Minerals Management Service delete from the proposed lease sale the approximately 730 acres in dispute from the Nome project.

The United States then sought leave of this Court to commence this action, which we granted on April 1, 1991. 499 U. S. 946. The two parties entered into an agreement pursuant to § 7 of the Outer Continental Shelf Lands Act (OCSLA), 43 U. S. C. § 1336, and Alaska Stat. Ann. § 38.05.137 (1989), to direct revenues from the disputed acreage into an escrow account that would then be paid to the prevailing party.[4] The United States and Alaska both filed motions for summary judgment, which we now consider.

II

Our principles for evaluating agency interpretations of congressional statutes are by now well settled. Generally, when reviewing an agency's construction of a statute administered by that agency, we first determine "whether Congress has directly spoken to the precise question at issue." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). Should the statute be silent or ambiguous on the direct question posed, we must then decide whether the "agency's answer is based on a permissible construction of the statute." *Id.*, at 843. In applying these principles, we examine in turn the language of § 10 of the RHA, the decisions of this Court interpreting it, and the longstanding construction of the Corps in fulfilling Congress' mandate.

---

[4] Although the bidding period closed without receipt of any bids, both sides agree that a live controversy exists in light of their continuing disagreement as to the location of the federal-state boundary and the prospect of future lease sales in the area. We agree that the controversy is not moot, since it involves a continuing controversy about territorial sovereignty over these submerged lands. *United States* v. *Alaska*, 422 U. S. 184, 186 (1975).

A

Section 10 of the RHA provides in pertinent part:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any . . . structures in any . . . water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U. S. C. § 403.

The language of this provision is quite broad. It flatly prohibits the "creation of *any* obstruction" to navigable capacity that Congress itself has not authorized, and it bans construction of any structure in any water of the United States "except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." *Ibid.* The statute itself contains no criteria by which the Secretary is to make an authorization decision; on its face, the provision appears to give the Secretary unlimited discretion to grant or deny a permit for construction of a structure such as the one at issue in this case. The Reports of the Senate and House Committees charged with making recommendations on the Act contain no hint of whether the drafters sought to vest in the Secretary the apparently unbridled authority the plain language of the statute seems to suggest. See H. R. Rep. No. 1826, 55th Cong., 3d Sess. (1899); S. Rep. No. 1686, 55th Cong., 3d Sess. (1899).

The statutory antecedents of this provision similarly offer little insight into Congress' intent. The precursors to § 10 of

the 1899 Act were §§ 7 and 10 of the 1890 River and Harbor Appropriation Act, Act of Sept. 19, 1890, 26 Stat. 454–455. Section 10 prohibited creation of "any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction," and § 7 made unlawful the building of any "wharf, pier, . . . or structure of any kind outside established harbor-lines . . . without the permission of the Secretary of War." *Ibid.* Congress slightly amended the statute in 1892 to add a prohibition on any construction that would "in any manner . . . alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure . . . unless approved and authorized by the Secretary of War." 1892 Rivers and Harbors Appropriation Act, Act of July 13, 1892, § 3, 27 Stat. 110. This statute reflected the reality that Congress could not itself attend to each such project individually, as it had from the earliest days of the Republic. As the House Report accompanying this law observed: "The most important feature of the bill now presented is the extent it goes in authorizing the Secretary of War to make contracts for the completion of some of the more important works of river and harbor improvement." H. R. Rep. No. 967, 52d Cong., 1st Sess., 2 (1892). "The departure from the old driblet system of appropriations," the House Report continued, "was found to work so well that your committee determined to apply it on a larger scale than in the last act." *Ibid.* See also S. Rep. No. 666, 52d Cong., 1st Sess., 4–5 (1892). By the time Congress passed the 1899 Act, therefore, the idea of delegating authority to the Secretary was well established even if the explanations for the broad language employed by Congress to carry out such a directive were sparse.

B

The substance of the RHA has been unchanged since its enactment, and the Court has had only a few occasions to decide whether to construe it broadly or narrowly. In one

such case, for example, the Court considered whether to issue a writ of mandamus to order the Secretary of War and the Chief of Engineers to grant a permit to build a wharf in navigable waters. *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352 (1933). Although it was stipulated that the project would not interfere with navigability, the Secretary nevertheless denied the permit on the ground that the wharf would impede plans developed by the United States to create a means of access to the proposed George Washington Memorial Parkway along the Potomac River in northern Virginia. *Id.*, at 355. The permit applicant argued that the Secretary's refusal to grant it was contrary to law on the theory that RHA § 10 authorized consideration only of the proposed construction's effects on navigation. In refusing to issue the writ of mandamus under equitable principles, the Court noted that petitioners' argument could be accepted "only if several doubtful questions are resolved in [petitioners'] favor," one of which was "whether a mandatory duty is imposed upon the Secretary of War by § 10 of the Rivers and Harbors Appropriation Act to authorize the construction of the proposed wharf if he is satisfied that it will not interfere with navigation." *Id.*, at 357.

Nor has such a broad interpretation of the RHA been exceptional. In *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491 (1960), the Court observed: "We read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes in *New Jersey* v. *New York*, 283 U. S. 336, 342 [1931], that 'A river is more than an amenity, it is a treasure,' forbids a narrow, cramped reading of either § 13 or of § 10." And as we stated in a later case: "Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad. And we have found that a principal beneficiary of the Act, if not the principal beneficiary, is the Government

itself." *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 201 (1967) (citations omitted).

In *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655 (1973), we applied this broad approach to the RHA in a somewhat analogous situation under a provision enacted contemporaneously with § 10. RHA § 13 provides that the Secretary of the Army "may permit the deposit" of refuse matter "whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby." 33 U. S. C. § 407. The case presented the question whether the statute *required* the Secretary to allow such discharges where they had no effect on navigation. We held that the statute should not be so construed. In reaching this conclusion, we observed that "even in a situation where the Chief of Engineers concedes that a certain deposit will not injure anchorage and navigation, the Secretary need not necessarily permit the deposit, for the proviso makes the Secretary's authority discretionary—*i. e.*, it provides that the Secretary 'may permit' the deposit." 411 U. S., at 662. We further noted that § 13 "contains no criteria to be followed by the Secretary in issuing such permits," *id.*, at 668, and rejected the argument that the agency's statutory authority should be construed narrowly.

In our view, § 10 should be construed with similar breadth. Without specifying the factors to be considered, § 10 provides that "it shall not be lawful to build or commence the building" of any structure in navigable waters of the United States "*except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.*" 33 U. S. C. § 403 (emphasis added). In light of our holding in *Pennsylvania Chemical Corp.* that the Secretary's discretion under § 13 was not limited to considering the effect of a refuse deposit on navigation, it logically follows that the Secretary's authority is not confined solely to considerations

of navigation in deciding whether to issue a permit under § 10.[5]

C

We now examine the administrative interpretation of § 10 down through the years with respect to the range of discretion extended to the Corps and the Secretary. An opinion by Attorney General George W. Wickersham in 1909, for example, denied the Secretary of War and the Chief of Engineers the authority to decide whether to issue a permit under RHA § 10 after "consider[ation of] questions relating to other interests than those having to do with the navigation of the waters." 27 Op. Atty. Gen. 284, 288.

This narrow view of the Secretary's authority persisted within the agency for many decades. "Until 1968," according to one document produced by the Corps of Engineers, "the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's waters." 42 Fed. Reg. 37122 (1977). In 1968, the regulations were amended so that the general policy guidance for permit issuance included consideration of "the effects of permitted activities on the public interest including

[5] Alaska reads *Pennsylvania Chemical Corp.* differently, suggesting that the case does not relate to the scope of the Corps' permitting authority under RHA § 10, but instead is confined to the issue of how broadly the agency's prosecutorial discretion should be defined. We disagree. Our analysis of the RHA in that case was not at all contingent on the underlying issue relating to a prosecution rather than a permitting decision. We placed great weight on the reading by the federal courts, which "almost universally agreed, as did the courts below, that § 13 is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters, regardless of the effect on navigation." 411 U. S., at 671. Alaska also cites *Wisconsin* v. *Illinois*, 278 U. S. 367, 418 (1929), for the proposition that § 10 only authorizes considerations of navigability in permit issuance decisions. We do not read the case in the same way. In our view, *Wisconsin* v. *Illinois* is more properly read to limit the Secretary's authority to issue a permit for nonnavigability reasons when an effect of the project would be to obstruct navigation. *Id.*, at 417.

effects upon water quality, recreation, fish and wildlife, pollution, our natural resources, as well as the effects on navigation." 33 CFR § 209.330(a).[6]

Yet even after the Corps adopted this more expansive reading, which the language of the statute and our decisions interpreting it plainly authorized, the House Committee on Government Operations nevertheless concluded that the Corps in practice was still not interpreting its statutory authority broadly enough. See H. R. Rep. No. 91–917, p. 6 (1970). The Committee was of the view that the Corps' earlier "restricted view of the 1899 act . . . was not required by the law." *Id.*, at 2. The Report summarized our holdings to the effect that the statutory language of RHA § 10 should be interpreted generously, *id.*, at 2–4, and commended the Corps "for recognizing [in 1968] its broader responsibilities" pursuant to its permitting authority under the RHA, *id.*, at 5. The Committee emphasized that the Corps "should instruct its district engineers . . . to increase their emphasis on how the work will affect *all aspects of the public interest*, including not only navigation but also conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway." *Id.*, at 6 (emphasis added). The Corps did not react to this "advice" until after the Fifth Circuit's decision in *Zabel* v. *Tabb*, 430 F. 2d 199 (1970). There the court upheld the Corps' consideration of environmental factors in its permitting decision even though the project would not interfere with navigation, flood control, or power production. After this decision, the Corps began the long process of changing its regulations governing permit application evaluations. See 42 Fed. Reg. 37122 (1977) (describing historical background of the agency's practice). In 1976, the Corps issued regulations interpreting its statutory authority

[6] The prior version of this regulation stated that "[t]he decision as to whether a permit will be issued must rest primarily upon the effect of the proposed work on navigation." 33 CFR § 209.330(a) (1967).

as empowering it to take into account a full range of economic, social, and environmental factors. See 33 CFR § 209.120(f)(1).

The regulations at issue in this lawsuit, therefore, reflect a broad interpretation of agency power under § 10 that was consistent with the language used by Congress and was well settled by this Court and the Army Corps of Engineers. With respect to the breadth of the Corps' public interest review, these regulations are substantially the same as those adopted in 1976 and provide:

> "(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in

general, the needs and welfare of the people." 33 CFR § 320.4(a)(1) (1991).

These regulations guide the Secretary's consideration of "public interest" factors to evaluate in determining whether to issue a permit under § 10 of the RHA. To the extent Alaska contends that these regulations are invalid because they authorize the Secretary to consider a wider range of factors than just the effects of a project on navigability, we reject this position. The State's reading of the Secretary's regulatory authority in this respect is inconsistent with the statute's language, our cases interpreting it, and the agency's practice since the late 1960's.

III

Alaska appears to concede some ground by acknowledging that the Secretary may not be limited solely to issues of navigability in considering whether to issue a § 10 permit.[7] The State in effect contends that, even if the statute authorizes consideration of factors other than just navigability, the regulations authorizing consideration of a project's consequences on the federal-state boundary exceed the Secretary's statutory mandate. The regulation at issue provides in pertinent part as follows:

---

[7] Alaska acknowledges, for example, that the Secretary can take into account the polluting consequences of a project, see Brief for Alaska 17, though the language of § 10 includes no mention of such effects. And a brief filed by numerous States and the Coastal States Organization as *amici curiae* appears to go even further by suggesting that "the Army Corps may deny a permit for the construction of a harbor facility if it is determined that the construction or facility would result in an obstruction to navigation, *endanger human health or welfare, the marine environment, or the economic potential.*" Brief for Alabama et al. as *Amici Curiae* 17 (emphasis added). Plainly these factors are not mentioned in RHA § 10. As our analysis will make clear, the United States is fundamentally correct that there is no legal basis for authorizing the Secretary to consider these factors but not the effects of a project on the federal-state boundary.

> "(f) *Effects on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. . . . Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will . . . request [the Solicitor's] comments concerning the effects of the proposed work on the outer continental rights of the United States. . . . The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General." 33 CFR § 320.4 (1991).

Alaska advances several arguments why such concerns exceed the scope of the Secretary's authority. We address each in turn.

A

Alaska's first argument proceeds from the premise that the SLA trumps the RHA for purposes of determining whether the Secretary may condition issuance of a permit on the State's disclaimer of sovereignty over the accreted submerged lands. The SLA establishes that a coastal State's boundary extends seaward "to a line three geographical miles distant from its coast line." 43 U. S. C. § 1312. The seaward boundary of state-owned lands is measured from a base line that is subject to change from natural and artificial alterations. See *United States* v. *California*, 381 U. S. 139, 176–177 (1965); *United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U. S. 11, 40, n. 48 (1969). In applying these rules, Alaska asserts that because the SLA extends a State's boundary seaward three miles from its coastline and

because our decisions have authorized artificial additions to affect determinations of the base line, the Army cannot by agency fiat override the will of Congress, as interpreted by our Court. Cf. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355, 376 (1986). According to Alaska, federalism interests should preclude our finding that the RHA confers power on the Secretary to condition issuance of a § 10 construction permit on the disclaimer of a change in the preproject federal-state boundary. See *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962).

The United States responds that Congress has already given the requisite authority to the agency through enactment of the RHA, and that the Secretary appropriately complied with that statute. In the Federal Government's view, the RHA sets out an absolute prohibition on construction of "any obstruction" in navigable waters, 33 U. S. C. § 403, and vests discretion in the Secretary of the Army to grant exceptions on a case-by-case basis when a structure is recommended by the Army Corps of Engineers. The United States maintains that the Secretary has the discretion to identify relevant considerations for issuing or denying a permit. Cf. *Jay* v. *Boyd*, 351 U. S. 345, 353–354 (1956).

We find the United States' argument to be the more persuasive one. Contrary to Alaska's position, the agency here is *not* usurping authority. The Secretary is making no effort to alter the existing rights of a State to sovereignty over submerged lands within three miles of the coastline. The SLA makes this guarantee and nothing in the Corps' practice, as exercised in this case, alters this right. What the Corps is doing, and what we find a reasonable exercise of agency authority, is to determine whether an artificial addition to the coastline will increase the State's control over submerged lands to the detriment of the United States' legitimate interests. If the Secretary so finds, nothing in the SLA prohibits this fact from consideration as part of the "public interest" review process under RHA § 10. Were we

to accept Alaska's position, the Federal Government's interests in submerged lands outside the State's zone of control would conceivably become hostage to a State's plans to add artificial additions to its coastline. And if Alaska's reading of the applicable law were followed to its logical extreme, the United States would be powerless to protect *its* interests in submerged lands if a State were to build an artificial addition to the coastline for the sole purpose of gaining sovereignty over submerged lands within the United States' zone, so long as the project did not affect navigability or cause pollution. Alaska points us to nothing in the SLA or to its legislative history that mandates such a result.[8]

It is important to note that neither the SLA itself, nor any of its legislative history, addresses the question of how artificial additions to the coastline affect the 3-mile limit, as we observed in *United States* v. *California*, 381 U. S. 139, 176, and n. 50 (1965). In that case, however, we did hold that international law recognized the seaward expansion of sovereignty through artificial additions to the coastline. *Id.*, at 177. But we also stated that "the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could thus be the subject of agreement between the parties." *Id.*, at 176. Alaska suggests that this language should not be read to vest power in the Secretary to condition permits on sovereignty disclaimers because the Special Master's report cited by the Court was written

---

[8] Indeed, the SLA also excepts from its operation "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U. S. C. § 1313(a). Furthermore, as to the lands granted to the States, the SLA provides that "[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." § 1314(a).

prior to enactment of the SLA. Brief for Alaska 26 (citing *California*, *supra*, at 143). This contention fails to persuade us, however, because we have already noted that the SLA did not specifically address artificial changes to the coastline, and because our opinion in *California* sanctioned the mechanism exercised by the Secretary in this case: "Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters." 381 U. S., at 177. Such "power over navigable waters" would be meaningless indeed if we were to accept Alaska's view that RHA § 10 permitted the United States to exercise it only when the State's project affected navigability or caused pollution.[9]

B

Alaska next contends that our decisions do not permit the Secretary to consider changes in federal-state boundaries as part of the § 10 "public interest" review process. First, the State suggests that such consideration would conflict with our decision in *California*, *supra*, at 176–177. In that case we adopted the Convention on the Territorial Sea and the

[9] Alaska's argument is also weakened by the existence of the OCSLA, 43 U. S. C. § 1331 *et seq.*, which provides that the United States has "jurisdiction, control, and power of disposition" over the Outer Continental Shelf, submerged lands identified by Congress as a "vital national resource reserve" of great value. §§ 1332(1) and (3). The "public interest" review undertaken by the Secretary in determining whether to issue a § 10 permit explicitly considers "the effects of the proposed work on the outer continental rights of the United States." 33 CFR § 320.4(f) (1991). Such a consideration in some form has been part of the equation of factors subject to the Secretary's review process since 1969. See 33 CFR § 209.120(d)(4) (1969). It is perfectly consistent with the OCSLA for the Secretary to consider a project's effects on United States' rights to submerged lands in deciding whether to issue a § 10 permit.

Contiguous Zone, Apr. 29, 1958, 15 U. S. T. 1607, T. I. A. S. No. 5639, for purposes of the SLA, explaining that such a result would establish "a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention)." 381 U. S., at 165. Because construction of an artificial port facility will, in certain circumstances, cause a change in the United States' *international* seaward boundary,[10] Alaska contends that the goal of a "single" coastline will be frustrated if we permit the Secretary to establish, in effect, one boundary for international purposes and a different one for domestic purposes.

As the United States maintains, however, our decision in *California* did not specify a "goal" of achieving a "single" coastline. Rather, our purpose was to give the SLA a "definiteness and stability." Such aims, of course, can be achieved without creating perfect symmetry between the Convention and the Act. Stability in a boundary line is achieved when the Secretary decides whether a State must disclaim its rights to accreted submerged lands caused by artificial additions just as surely as it is with ordinary coastline determinations occasioned by natural changes. The State intimates that problems relating to fishing, salvage operations, and criminal jurisdiction will result from "[u]nstable and unpredictable administrative rules [that] will create confusion in many areas." Reply Brief for Alaska 6. Such speculative concerns, however, arise only when the 3-mile

---

[10] Under international law, artificial alterations to the coastline will extend a country's boundaries for purposes of determining the territorial sea and exclusive economic zone. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U. S. T. 1607, T. I. A. S. No. 5639, art. 8; Brief for United States 25, n. 6 (stating that "[t]he United States has not ratified [the United Nations Convention on the Law of the Sea], but has recognized that its baseline provisions reflect customary international law").

boundary itself is indefinite.[11] But uncertainty in cases such as this one surely ends when the State disclaims its sovereignty over accreted submerged lands. The 3-mile boundary remains the same. And in those circumstances in which the Secretary does not require a disclaimer and the 3-mile federal-state boundary extends from the new base line, presumably should there arise any of the federal-state problems Alaska identifies, changes in nautical maps could readily be amended to reflect such changes. Nothing in the parties' lodgings with the Court suggests why fishermen and other sailors who rely on such charts will suffer prejudice by the rule we announce today.[12]

---

[11] We add that variations between international and federal-state boundaries are not uncommon. As we recognized in *United States* v. *California*, 381 U. S. 139, 165–166 (1965), changes in Convention rules might render the international and federal-state boundaries noncoincident. In the SLA itself, Congress recognized the possibility that variations between international and federal-state boundaries might occur by providing that a decree fixed by our Court "shall not be ambulatory" even though erosion or accretion may alter the international boundary. 43 U. S. C. § 1301(b). We also note that the President's proclamation of a 12-mile territorial sea for international law purposes functionally established a distinction between the international and the federal-state boundaries. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 441, n. 8 (1989). Finally, as the United States accurately points out, some coastal States have created or permitted variations between the international boundary and the federal-state boundaries through compromise agreements reached with the United States. See *Mississippi* v. *United States*, 498 U. S. 16 (1990).

[12] Alaska also suggests that the regulations at issue in this case conflict with our decision in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), which held that a coastal commission could not condition the granting of a construction permit on the conferring of a public access easement across a landowner's beach. Alaska quotes language in *Nollan* to the effect that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'" *Id.*, at 837. This rule, however, has no applicability in a situation such as this one, in which we evaluate the statutory authority underlying an agency's action. *Id.*, at 836. Even were the *Nollan* situation analogous to that presented here,

Accordingly, we find no merit in Alaska's argument that, in conducting the permit review process under RHA § 10, the Secretary cannot consider a project's effects on the federal-state boundary.

IV

Finally, Alaska maintains that even if the regulations *are* authorized by the RHA, the Secretary's actions were not consistent with those regulations. The State argues that nothing in the applicable regulations authorizes the Army Corps of Engineers to force a coastal State to abdicate rights to submerged lands as a condition to issuance of a permit for construction of a shoreline project. Alaska suggests that "the regulation addresses activities on submerged lands, not the property interests in the submerged lands." Brief for Alaska 28. Nor can the Secretary derive authority to condition disclaimers on interagency coordination responsibilities, according to the State, because 33 CFR § 320.4(g)(6) (1991) states specifically that "dispute[s] over property ownership will not be a factor in the Corps' public interest decision." Alaska further posits that the regulations at § 320.4(a)(1), which include numerous factors to be evaluated in balancing the public interest, do not make reference to the United States' property interests.

As our analysis in Parts III–A and III–B suggests, we do not find this argument persuasive. The regulations indicate that the Corps may include in its evaluation the "effects of the proposed work on the outer continental rights of the United States." 33 CFR § 320.4(f) (1991). It is untenable to maintain that the legitimate property interests of the United States fall outside the relevant criteria for a decision that requires the Secretary to determine whether issuance of a permit would affect the "public interest." The regula-

---

we note that Alaska would gain no benefit because the purpose behind imposing a condition for issuance of the permit—to protect federal rights to submerged lands—is the same as that for denying the permit.

tions at § 320.4(g)(6), upon which Alaska places some weight, clearly do not speak to property disputes of the type at issue here. Moreover, we are unpersuaded by Alaska's contention that the authority to require disclaimers cannot be inferred from the regulatory scheme. It would make little sense, and be inconsistent with Congress' intent, to hold that the Corps legitimately may *prohibit* construction of a port facility, and yet to deny it the authority to seek the less drastic alternative of conditioning issuance of a permit on the State's disclaimer of rights to accreted submerged lands.

Alaska also makes various challenges to the administrative procedures followed in this case, and especially to the alleged shortcoming of the Secretary in not formalizing the authority to condition disclaimers of sovereignty in the permit-issuance process.[13] The "policy" followed in this case, however, is not contrary to law simply because of its specific omission from the regulations. See *United States* v. *Gaubert*, 499 U. S. 315, 324 (1991) (observing that some agencies "establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs"). Certainly the Corps communicated its intention openly to the appropriate state officials, and therefore did not force Alaska "'to litigate with agencies on the basis of secret laws.'" *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 9 (1974) (quoting the case below, 151 U. S. App. D. C. 174, 181, 466 F. 2d 345, 352 (1972)). See Joint Stipulation of Facts 24a–25a. The United States avers that such disclaimers have been requested on a case-

[13] The State also contests the legality of the Secretary's actions in this case under the Administrative Procedure Act, 5 U. S. C. § 706, especially the regulations at 33 CFR § 320.4(f) (1991) that authorize the Secretary to take into account changes in the base line in making § 10 permit issuance decisions. Contrary to Alaska's contention, these regulations were adopted through notice and comment proceedings, see 39 Fed. Reg. 12115 (1974); 38 Fed. Reg. 12217 (1973), as were subsequent amendments, see 51 Fed. Reg. 41220 (1986); 42 Fed. Reg. 37122 (1977).

by-case basis since 1970 and that "Alaska fails to explain why the Corps' approach is improper or what specific advantages would result from identifying the option through a formal regulation." Brief for United States in Opposition 16.

We cannot say that in this case the Corps acted in an arbitrary or capricious manner. It notified state officials promptly that the Solicitor of the Interior Department objected to issuance of the permit; it specified a curative option that could be pursued; and it afforded Alaska ample time to consider the disclaimer, to consult with federal officials, and then to draft the disclaimer. See Joint Stipulation of Facts 2–7, App. to Joint Stipulation of Facts 11a–16a, 17a–19a, 20a–21a, 22a–23a, 24a, 26a–31a. Nor can Alaska contend that it lacked notice, since the disclaimer it filed in this case is similar in form to those which it has filed in past § 10 permit proceedings. See Joint Lodging of Permits and Disclaimers.[14] We conclude that the Corps' actions in this case were neither arbitrary nor capricious.

V

Accordingly, we hold that the Secretary of the Army acted within his discretion in conditioning approval of the Nome

---

[14] Indeed, one such disclaimer dated December 1, 1980, for a project in the oil-rich Prudhoe Bay, stated as follows:

"In consideration of the issuance, by the Secretary of the Army or his authorized representative, of a permit for construction of an extension to the ARCO dock at Prudhoe Bay for purposes of the waterflood project designed to result in substantial secondary recovery from the existing Prudhoe Bay oil and gas field, pursuant to the application filed by ARCO and SOHIO, the State of Alaska agrees that the shoreline, coast line, and boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operation of such extension. This Agreement should be construed as a binding disclaimer by the State of Alaska to the effect that the State does not, and will not, treat the ARCO dock waterflood extension as extending its coast line for purposes of the Submerged Lands Act." Joint Lodging of Permits and Disclaimers 5(a)2.

port facilities construction permit on a disclaimer by Alaska of a change in the federal-state boundary that might be caused by the Nome project. The United States' motion for summary judgment is granted, and Alaska's motion for summary judgment is denied.

It is so ordered.

Syllabus

BARKER ET AL. *v.* KANSAS ET AL.

CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 91–611. Argued March 3, 1992—Decided April 21, 1992

Title 4 U. S. C. § 111 authorizes the States to tax federal employees' compensation if the taxation does not discriminate against the employees because of the compensation's source. After *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, invalidated, under § 111 and the doctrine of intergovernmental tax immunity, the Michigan income tax imposed on the benefits of federal, but not state and local, civil service retirees, petitioners filed suit in a Kansas state court challenging that State's imposition of an income tax on federal military retirement benefits but not on the benefits received by retired state and local government employees. In affirming the trial court's grant of summary judgment for the state defendants, the State Supreme Court concluded that military retirement benefits constitute reduced pay for reduced current services, in contrast to the deferred compensation for past services embodied in state and local government retirement benefits, and that this "significant differenc[e]" justified the State's differential treatment of the two classes of retirees under *Davis*, *supra*, at 816.

Held: The Kansas tax on military retirees is inconsistent with § 111. The State Supreme Court's conclusion that, for purposes of state taxation, military retirement benefits may be characterized as current compensation for reduced current services does not survive analysis on several bases. First, there are no "significant differences" between military retirees and state and local government retirees in terms of calculating retirement benefits. The amount of retired pay a service member receives is computed not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement. Military benefits thus are determined in a manner very similar to that of the Kansas Public Employee Retirement System. Second, this Court's precedents discussing military retirement pay provide no support for the state court's holding. The statement in *United States* v. *Tyler*, 105 U. S. 244, 245, that such pay is effectively indistinguishable from current compensation at a reduced rate was made in the context of the particular holding of that case, and cannot be taken as establishing that retirement benefits are for all purposes the equivalent of current compensation for reduced current services. And, although *McCarty* v. *McCarty*, 453 U. S. 210, 222, referred to *Tyler*, it did not expressly approve *Tyler*'s description of mili-

Syllabus

tary retirement pay, but specifically reserved the question whether federal law prohibits a State from characterizing such pay as deferred compensation and urged the States to tread with caution in this area. Third, an examination of other federal statutes treating military retirement pay indicates that Congress for many purposes does not consider such pay to be current compensation for reduced current services. See, *e. g.*, 10 U. S. C. § 1408(c)(1); 26 U. S. C. § 219(f)(1). Thus, military retirement benefits, like the benefits paid to Kansas government retirees, are to be considered deferred pay for past services for purposes of § 111. Pp. 597–605.

249 Kan. 186, 815 P. 2d 46, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 605.

Kevin M. Fowler argued the cause for petitioners. With him on the brief were *Kenton C. Granger, Raymond L. Dahlberg, Angela K. Green, Roger M. Theis, John C. Frieden*, and *Terence A. Lober.*

John F. Manning argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace*, and *David English Carmack.*

James A. D. Bartle argued the cause for respondents. With him on the brief were *Mark A. Burghart* and *Michael M. Rehm.**

**Eugene O. Duffy* filed a brief for the Retired Officers Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Mary Sue Terry*, Attorney General of Virginia, *H. Lane Kneedler*, Chief Deputy Attorney General, and *Gail Starling Marshall*, Deputy Attorney General, *Peter W. Low*, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Michael J. Bowers* of Georgia, *Bonnie J. Campbell* of Iowa, *Marc Racicot* of Montana, *Susan B. Loving* of Oklahoma, *Paul Van Dam* of Utah, and *James E. Doyle* of Wisconsin; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *Michael G. Dzialo.*

JUSTICE WHITE delivered the opinion of the Court.

The State of Kansas taxes the benefits received from the United States by military retirees but does not tax the benefits received by retired state and local government employees. Kan. Stat. Ann. § 79–3201 *et seq.* (1989).[1] The issue before us is whether the tax imposed on the military retirees is inconsistent with 4 U. S. C. § 111, which provides:

> "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

Shortly after our decision in *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), which invalidated under § 111 the Michigan income tax imposed on federal civil service re-

---

[1] As the Kansas Supreme Court explained, to arrive at the adjusted gross income of a taxpayer under the Kansas Income Tax Act, the starting point is the adjusted gross income under the federal Internal Revenue Code, which includes retirement benefits received by retired military officials and state and local government retirees. 249 Kan. 186, 190–191, 815 P. 2d 46, 49–50 (1991). As relevant for present purposes, in calculating Kansas' adjusted gross income, the retirement benefits of state and local governments are deducted and are exempt from taxation. See Kan. Stat. Ann. § 79–32,117(c)(ii) (Supp. 1990); § 74–4923(b) (Supp. 1990); see also 249 Kan., at 190–191, 815 P. 2d, at 49–50 (listing classes exempt from state taxation). Benefits received under the Federal Civil Service Retirement System and by retired railroad employees are also exempt. Kan. Stat. Ann. §§ 79–32,117(c)(vii) and (viii) (Supp. 1990). Not deducted and hence taxable are benefits received by retired military personnel, certain Central Intelligence Agency employees, officials serving in the National Oceanic and Atmospheric Association or the Public Health Service, and retired federal judges. See 249 Kan., at 205, 815 P. 2d, at 58.

tirees, two class actions were filed in Kansas District Court challenging the state income tax imposed on military retirement benefits. Together the classes comprised some 14,000 military retirees, who received federal Armed Forces retirement benefits and were subject to the Kansas income tax for one or more of the tax years from 1984 through 1989. The classes also included spouses of the retirees, where applicable. Plaintiff taxpayers sought a declaratory judgment that the Kansas income tax discriminates against them in favor of state and local government retirees, in violation of § 111 and the constitutional principles of intergovernmental tax immunity applied in *Davis*. They also requested a permanent injunction to prohibit assessment of the tax against military retirees, as well as refunds of any taxes paid by class members for the tax years 1984 through 1989.[2] The District Court granted summary judgment for the defendants, and the Supreme Court of Kansas affirmed, 249 Kan. 186, 815 P. 2d 46 (1991). We granted certiorari because the holding below is arguably inconsistent with our decision in *Davis* and conflicts with decisions of other state courts of last resort. 502 U. S. 977 (1991).[3]

Our approach to deciding this case is controlled by *Davis*, which invalidated a Michigan law that imposed taxes on federal civil service retirees' benefits but not on benefits received by state and local government retirees. In reaching

---

[2] The taxpayers also relied on the Supremacy Clause of the United States Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and Article 11, § 2, of the Kansas Constitution. The taxpayers further alleged that the State deprived them of their civil rights as secured by the United States Constitution and laws in violation of the Fourteenth Amendment and of 42 U. S. C. § 1983. See 249 Kan., at 188, 815 P. 2d, at 48.

[3] See, *e. g.*, *Kuhn* v. *State*, 817 P. 2d 101 (Colo. 1991) (en banc); *Pledger* v. *Bosnick*, 306 Ark. 45, 811 S. W. 2d 286 (1991); and *Hackman* v. *Director of Revenue*, 771 S. W. 2d 77 (Mo. 1989) (en banc), cert. denied, 493 U. S. 1019 (1990).

that decision, we traced the history of 4 U. S. C. § 111 and concluded that "the retention of immunity in § 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." 489 U. S., at 813. Under that doctrine, we evaluate a state tax that is alleged to discriminate against federal employees in favor of state employees by inquiring "whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Id.*, at 816 (quoting *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, 383 (1960)).

Well aware of *Davis*, the State Supreme Court undertook such an inquiry and concluded that significant differences existed between military retirees, who are taxed by Kansas, and state and local government retirees, who are not. The court proceeded to consider the State's six proffered distinctions between military retirees and state and local government pensioners:

> "(1) [F]ederal military retirees remain members of the armed forces of the United States after they retire from active duty; they are retired from active duty only; (2) federal military retirees are subject to the Uniform Code of Military Justice (UCMJ) and may be court martialed for offenses committed after retirement; (3) they are subject to restrictions on civilian employment after retirement; (4) federal military retirees are subject to involuntary recall; (5) federal military retirement benefits are not deferred compensation but current pay for continued readiness to return to duty; and (6) the federal military retirement system is noncontributory and funded by annual appropriations from Congress; thus, all benefits received by military retirees have never been subject to tax." 249 Kan., at 196, 815 P. 2d, at 53.

The court deemed the first four differences significant, not because in themselves they justified disparate tax treatment, but because they supported the fifth distinction—that military retirement benefits constitute reduced pay for reduced current services, rather than deferred compensation for past services. *Id.*, at 197, 815 P. 2d, at 53. By contrast, "[s]tate and local government retirement benefits are deferred compensation," the court found, and "not current pay." *Ibid.* The court concluded that this principal distinction between military retirees and state and local government retirees justified their differential treatment under the State's tax laws. Accordingly, it held that a military retiree's benefits were as legally subject to state taxation as the income of active military personnel, whose pay was liable for state taxation pursuant to the United States' consent, as expressed in 4 U. S. C. § 111.

Military retirees unquestionably remain in the service and are subject to restrictions and recall; in these respects they are different from other retirees, including the state and local government retirees whom Kansas does not tax. But these differences, standing alone, do not justify the differential tax treatment at issue in this case. Nor do these differences persuasively indicate that, for purposes of 4 U. S. C. § 111, Kansas may treat military retirement pay as reduced pay for reduced services. As a general matter, a military retiree is entitled to a stated percentage of the pay level achieved at retirement, multiplied by the years of creditable service. Brief for United States as *Amicus Curiae* 11, n. 16. In this respect, "retired [military] pay bears some of the features of deferred compensation. The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement." *McCarty* v. *McCarty*, 453 U. S. 210, 223, n. 16 (1981) (citation omitted). By taking into account years of service, the formula used to calculate retirement benefits

leaves open the possibility of creating disparities among members of the same preretirement rank. Such disparities cannot be explained on the basis of "current pay for current services," since presumably retirees subject to these benefit differentials would be performing the same "services." Furthermore, military benefits are determined in a manner very similar to that of the Kansas Public Employee Retirement System. Brief for United States as *Amicus Curiae* 11, n. 16. In terms of calculating retirement benefits, therefore, we see no significant differences between military retirees and state and local government retirees that justify disparate tax treatment by the State.

In holding to the contrary, however, the Kansas Supreme Court found support in some of our precedents. In *United States* v. *Tyler*, 105 U. S. 244 (1882), for example, the Court decided that officers retired from active military service were entitled to the same percentage increase in pay that a statute had provided for active officers. The Court reached this result in part by characterizing military retirement pay as "compensation [that] is continued at a reduced rate, and the connection is continued, with a retirement from active service only." *Id.*, at 245.[4]

The State Supreme Court also found support in *McCarty*, *supra*. In that case the California courts considered the applicability of state community property laws to the military retirement benefits for which an officer who had 18 years of service would be eligible 2 years hence. The California courts had held these benefits subject to division upon disso-

[4] The Court explained:

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service." *United States* v. *Tyler*, 105 U. S., at 246.

lution of the marriage. In this Court the officer challenged the holding on two grounds: first, that his prospective retirement benefits would be current pay, not subject to division as deferred compensation for services performed during the marriage; and second, that applying the community property law to retirement benefits conflicted with the federal military scheme regardless of whether retired pay is current income or deferred compensation. See *id.*, at 221. Citing and quoting *Tyler, supra,* our opinion noted that military retirees differed in some respects from other retired federal personnel and that these differences had led various courts, "including this one," to opine that military retirement pay is reduced compensation for reduced current services. 453 U. S., at 222. We found no need, however, to decide "whether federal law prohibits a State from characterizing retired pay as deferred compensation," because we sustained petitioner's alternative ground for overturning the judgment below. *Id.*, at 223.

The Kansas Supreme Court reasoned that *McCarty*'s recognition of the *Tyler* holding, as well as the decisions of several Courts of Appeals, indicated that *Tyler* controlled the description of military retirement pay. It thus concluded that taxing military retirement pay as current income could not validly be characterized as discriminating in favor of state and local government employees, whose benefits were exempt as being deferred compensation for past services. See 249 Kan., at 198, 815 P. 2d, at 54. For several reasons, we find this reading of our precedents unpersuasive.

First, *Tyler*'s statement that retirement pay is effectively indistinguishable from current compensation at a reduced rate was unnecessary to reach the result that Congress intended to include the retirement benefits of a certain class of retired officers in its provision for increasing the pay of active-duty officers. In holding that such retired officers were eligible for this increase, the Court based its holding on the "uniform treatment" of retired and active officers in

various statutory provisions that made the retired officers "a part of the army" for purposes of determining eligibility for the increase. *Tyler*, 105 U. S., at 245–246. The Court described "a manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service." *Id.*, at 245. The latter group were ineligible for the pay increase because their connection to the service had been completely terminated. In interpreting the applicable statutory provisions, therefore, the "uniform treatment" of active-duty officers and the one class of retired officers was crucial to the decision; *Tyler* thus cannot be taken as establishing that retirement benefits are for all purposes the equivalent of current compensation for reduced current services.

Moreover, although *McCarty* referred to *Tyler*, it did not expressly approve *Tyler*'s description of military retirement pay. To the contrary, by declining to hold that federal law forbade the States to treat military retirement pay as deferred income and resting our decision on another ground, we reserved the question for another case. To punctuate this point, we noted that, despite *Tyler*, the state courts were divided as to whether military retirement pay is current income or deferred compensation. See *McCarty*, 453 U. S., at 222–223, nn. 15 and 16. We also stated that although military retirement pay bears some of the features of deferred compensation, two indicia of retired military service include a restriction on activities and a chance of being recalled to active duty. Hence, "the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that *States must tread with caution in this area*, lest they disrupt the federal scheme." *Id.*, at 224, n. 16 (emphasis added).

In urging States to be cautious in treating military retirement pay, *McCarty* thus should not be read to consider *Tyler* as settling the issue. Indeed, our handling of the community property dissolution issue suggests the opposite. In *Mc-*

Carty we said that "[t]he community property division of military retired pay rests on the premise that that pay, like a typical pension, represents deferred compensation for services performed during the marriage." 453 U. S., at 221. Had we accepted as definitive for all purposes *Tyler*'s characterization of such pay as current income, our decision in *McCarty* would have been simple because we would have been foreclosed from treating military retired pay as deferred compensation. Such a holding would have been a much easier way of deciding *McCarty* than the alternative basis for decision—that the application of California's community property law conflicted with the federal military retirement scheme.

Finding no support for the Kansas Supreme Court's holding either in differences in the method of calculating benefits or in our precedents discussing military retirement pay, we examine congressional intent, as inferred through other applicable statutes that treat military retirement pay. Promptly after *McCarty*, for example, Congress enacted the Uniformed Services Former Spouses' Protection Act, 10 U. S. C. § 1408(c)(1), which negated *McCarty*'s holding by giving the States the option of treating military retirement pay "either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." Because the premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services, see *McCarty*, *supra*, at 221, Congress clearly believed that payment to military retirees is in many respects not comparable to ordinary remuneration for current services. To extend to States the option of deeming such benefits as part of the marital estate as a matter of state law would be inconsistent with the notion that military retirement pay should be treated as indistinguishable from compensation for reduced current services.

Furthermore, both federal and Kansas income tax law treat military retirement pay as deferred compensation for the purpose of determining deductibility of contributions to an individual retirement account (IRA). For federal purposes, an IRA deduction is limited to the amount of the taxpayer's compensation or $2,000, whichever is less. But the term "compensation" does not include "any amount received as a pension or annuity and does not include any amount received as deferred compensation." 26 U. S. C. § 219(f)(1). Under this provision, military retirement benefits are not compensation for the purpose of making deductible contributions to an IRA. See generally M. Weinstein, Mertens Law of Federal Income Taxation § 25C.12, p. 58 (1988). The State Supreme Court in this case noted that the Kansas tax law follows the federal scheme and does not treat military retirement pay as current compensation for IRA purposes, like other types of retirement benefits. 249 Kan., at 201–202, 815 P. 2d, at 56. The court believed that this treatment of military retirement pay was limited to the IRA context, *id.*, at 202–203, 815 P. 2d, at 57, a position we find unpersuasive. The court's view ignores the importance of this provision to understanding that Congress for many purposes does not consider military retirement pay to be current compensation for current services. The State's position is weakened further by another fact, that Kansas tax law considers military retirement benefits as current compensation under its general income tax provision but it does not for IRA deductibility purposes. The court asserted that "the distinction is not so much the characterization as current income or deferred compensation, but rather active versus passive activities required to earn the income." *Id.*, at 203, 815 P. 2d, at 57. But as the United States persuasively contends: "The State's failure to treat military retired pay consistently suggests that the State's articulated rationale is not in fact the basis for the disparate treatment, but only a cloak for discrimina-

tion against federally funded benefits." Brief for United States as *Amicus Curiae* 22.

We therefore determine that the Kansas Supreme Court's conclusion that, for purposes of state taxation, military retirement benefits may be characterized as current compensation for reduced current services does not survive analysis in light of the manner in which these benefits are calculated, our prior cases, or congressional intent as expressed in other provisions treating military retirement pay. For purposes of 4 U. S. C. § 111, military retirement benefits are to be considered deferred pay for past services. In this respect they are not significantly different from the benefits paid to Kansas state and local government retirees.[5] Accordingly, we reverse the judgment of the Kansas Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE THOMAS joins, concurring.

While I agree with the Court's explanation of why this case is controlled by *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), I remain convinced that that case seri-

---

[5] In listing the differences between the two classes of retirees involved here, the State Supreme Court also observed that Kansas state and local retirees have contributed to their retirement benefits and that their contributions have been taxed as part of their current income. Military personnel, on the other hand, do not contribute to their retirement benefits, which are paid out of annual appropriations. As we read the court, however, it did not rest its decision on this difference and in the end returned to its basic holding that military retirees "receive current compensation while all persons receiving state and local government retirement benefits receive deferred compensation." 249 Kan., at 205, 815 P. 2d, at 58. Moreover, we note that the State applies its income tax to other federal retirees who contributed to their benefits, such as members of the Central Intelligence Agency, Foreign Service, bankruptcy judges, and United States magistrates. See *ibid.*

ously misapplied the doctrine of intergovernmental tax immunity. A state tax burden that is shared equally by federal retirees and the vast majority of the State's citizens does not discriminate against those retirees. See *id.*, at 823–824 (STEVENS, J., dissenting). The Federal Government has a legitimate interest in protecting its employees from disparate treatment, but federal judges should not be able to claim a tax exemption simply because a State decides to give such a benefit to the members of its judiciary instead of raising their salaries. I write separately to make this point because what I regard as this Court's perverse application of the nondiscrimination principle is subject to review and correction by Congress. See *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946).

Syllabus

UNITED STATES DEPARTMENT OF ENERGY *v.* OHIO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90–1341. Argued December 3, 1991—Decided April 21, 1992*

The Clean Water Act (CWA) and the Resource Conservation and Recovery Act of 1976 (RCRA) prohibit the discharge or disposal of pollutants without a permit, assign primary authority to issue permits to the Environmental Protection Agency (EPA), and allow EPA to authorize a State to supplant the federal permit program with one of its own under specified circumstances. Respondent State sued petitioner Department of Energy (DOE) over its operation of a uranium-processing plant in Ohio, seeking, among other relief, both state and federal civil penalties for past violations of the CWA and RCRA and of state laws enacted to supplant those federal statutes. Although conceding, *inter alia*, that both statutes render federal agencies liable for "coercive" fines imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively, DOE asserted sovereign immunity from liability for "punitive" fines imposed to punish past violations. The District Court held that both statutes waived federal sovereign immunity from punitive fines, by both their federal-facilities and citizen-suit sections. The Court of Appeals affirmed in part, holding that Congress had waived immunity as to punitive fines in the CWA's federal-facilities section and RCRA's citizen-suit section, but not in RCRA's federal-facilities section.

Held: Congress has not waived the National Government's sovereign immunity from liability for civil fines imposed by a State for past violations of the CWA or RCRA. Pp. 615–629.

(a) This Court presumes congressional familiarity with the common rule that any waiver of the Government's sovereign immunity must be unequivocal. See *United States* v. *Mitchell*, 445 U. S. 535, 538–539. Such waivers must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. See, *e. g.*, *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685–686. P. 615.

(b) Although both the CWA and RCRA citizen-suit sections authorize a State to commence a civil action "against any person (including . . .

---

*Together with No. 90–1517, *Ohio et al.* v. *United States Department of Energy*, also on certiorari to the same court.

the United States . . .)," and authorize the district courts to impose punitive fines under the Acts' civil-penalties sections, the incorporation of the latter sections must be read to encompass their exclusion of the United States from among the "person[s]" who may be fined, see, *e. g.*, *Engel* v. *Davenport*, 271 U. S. 33, 38. The citizen-suit sections' initial inclusion of the United States as a "person" goes only to the clauses subjecting the Government to suit, and a broader waiver may not be inferred. Both the CWA and RCRA contain various provisions expressly defining "person" for purposes of the entire section in which the term occurs, thereby raising the inference that a special definition not described as being for purposes of its "section" or "subchapter" was intended to have the more limited application to its own clause or sentence. This textual analysis gives effect to all the language of the citizen-suit sections, since their incorporations of their statutes' civil-penalties sections will effectively authorize punitive fines where a polluter other than the United States is brought to court, while their explicit authorizations for suits against the United States concededly authorize coercive sanctions. Pp. 615–620.

(c) The relevant portion of the CWA's federal-facilities section, 33 U. S. C. § 1323(a)—which, *inter alia*, subjects the Government to "all . . . State . . . requirements . . . and process and sanctions"; explains that the Government's corresponding liability extends to "any requirement, whether substantive or procedural . . . , and . . . to any process and sanction . . . enforced in . . . cour[t]"; and provides that the Government "shall be liable only for those civil penalties arising under Federal law or imposed by a State . . . court . . . to enforce [its] order or . . . process"—does not waive the Government's immunity as to punitive fines. Ohio's first argument, that § 1323(a)'s use of the word "sanction" must be understood to encompass punitive fines, is mistaken, as the term's meaning is spacious enough to cover coercive as well as punitive fines. Moreover, good reason to infer that Congress was using "sanction" in its coercive sense, to the exclusion of punitive fines, lies in the fact that § 1323(a) twice speaks of "sanctions" in conjunction with judicial "process," which is characteristically "enforced" through forward-looking coercive measures, and distinguishes "process and sanctions" from substantive "requirements," which may be enforced either by coercive or punitive means. Pp. 620–623.

(d) Ohio's second § 1323(a) argument, that fines authorized under an EPA-approved state permit program are within the scope of the "civil penalties" covered by the section's final waiver proviso, also fails. The proviso's second modifier makes it plain that "civil penalties" must at least include a coercive penalty since they are exemplified by penalties "imposed by a State . . . court to enforce [its] order." Moreover, the

Syllabus

contention that the proviso's "arising under federal law" modifier is broad enough to include penalties prescribed by EPA-approved state statutes supplanting the CWA is answered by this Court's interpretation of the phrase "arising under" federal law in 28 U. S. C. § 1331 to exclude cases in which the plaintiff relies on state law, even when the State's exercise of power in the particular circumstances is expressly permitted by federal law, see, *e. g.*, *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 116, and by the probability that Congress adopted the same interpretation of "arising under federal law" here, see, *e. g.*, *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 284–285. The plain language of the "civil penalties arising under federal law" phrase suggests an apparently expansive, but uncertain, waiver that is in tension with the clear waiver for coercive fines evinced in § 1323(a)'s antecedent text; that tension is resolved by the requirement that any statement of waiver be unequivocal and the rule that waivers be narrowly construed. Pp. 623–627.

(e) RCRA's federal-facilities section—which, in relevant part, subjects the Government to "all . . . State . . . requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)," and provides that the United States "shall [not] be immune . . . from any process or sanction of any . . . Court with respect to the enforcement of any such injunctive relief"—is most reasonably interpreted as including substantive standards and the coercive means for implementing those standards, but excluding punitive measures. All of the textual indications of the kinds of requirements meant to bind the Government refer either to mechanisms requiring review for substantive compliance (permit and reporting requirements) or to mechanisms for enforcing substantive compliance in the future (injunctive relief and sanctions to enforce it), in stark contrast to the statute's failure to mention any mechanism for penalizing past violations. Moreover, the fact that the only specific reference to an enforcement mechanism in the provision's final sentence describes "sanction" as a coercive means of injunctive enforcement bars any inference that a waiver of immunity from "requirements" somehow extends to punitive fines that are never so much as mentioned. Pp. 627–628.

904 F. 2d 1058, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court with respect to Part II–C, and the opinion of the Court with respect to Parts I, II–A, II–B, and III, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. WHITE, J., filed an opinion concurring in

part and dissenting in part, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 629.

James A. Feldman argued the cause for petitioner in No. 90–1341 and respondent in No. 90–1517. With him on the briefs were *Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Robert L. Klarquist*, and *Jacques B. Gelin.*

Jack A. Van Kley, Assistant Attorney General of Ohio, argued the cause for respondents in No. 90–1341 and petitioners in No. 90–1517. With him on the brief were *Lee Fisher*, Attorney General, and *Timothy J. Kern* and *Terrence S. Finn*, Assistant Attorneys General.†

---

†Briefs of *amici curiae* were filed for the State of California et al. by *Gale A. Norton*, Attorney General of Colorado, *Raymond T. Slaughter*, Chief Deputy Attorney General, *Timothy M. Tymkovich*, Solicitor General, *Martha E. Rudolph, Cynthia M. Vagelos*, and *Mary Capdeville*, Assistant Attorneys General, *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *Theodora Berger* and *R. H. Connett*, Senior Assistant Attorneys General, *Edwin F. Lowry*, Deputy Attorney General, *Charles E. Cole*, Attorney General of Alaska, *Grant Woods*, Attorney General of Arizona, *Paige Murphy-Young*, Assistant Attorney General, *Winston Bryant*, Attorney General of Arkansas, *Richard Blumenthal*, Attorney General of Connecticut, *Warren Price III*, Attorney General of Hawaii, *Larry EchoHawk*, Attorney General of Idaho, *Roland W. Burris*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Bonnie J. Campbell*, Attorney General of Iowa, *Frederic J. Cowan*, Attorney General of Kentucky, *Michael E. Carpenter*, Attorney General of Maine, *Dennis J. Harnish*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Frankie Sue Del Papa*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *T. Travis Medlock*, Attorney General of South Carolina, *Charles W. Burson*, Attorney General of Tennessee, *Michael D. Pearigen*, Deputy Attorney General, *Dan Morales*, Attorney General of Texas, *Thomas Edwards*, Assistant Attorney General, *Paul Van Dam*, Attorney

JUSTICE SOUTER delivered the opinion of the Court.

The question in these cases is whether Congress has waived the National Government's sovereign immunity from liability for civil fines imposed by a State for past violations of the Clean Water Act (CWA), 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*, or the Resource Conservation and Recovery Act of 1976 (RCRA), 90 Stat. 2796, as amended, 42 U. S. C. § 6901 *et seq.* We hold it has not done so in either instance.

I

The CWA prohibits the discharge of pollutants into navigable waters without a permit. Section 402, codified at 33 U. S. C. § 1342, gives primary authority to issue such permits to the United States Environmental Protection Agency (EPA), but allows EPA to authorize a State to supplant the federal permit program with one of its own, if the state scheme would include, among other features, sufficiently stringent regulatory standards and adequate provisions for penalties to enforce them. See generally 33 U. S. C. § 1342(b) (requirements and procedures for EPA approval of state water-pollution permit plans); see also 40 CFR §§ 123.1–123.64 (1991) (detailed requirements for state plans). RCRA regulates the disposal of hazardous waste in much the same way, with a permit program run by EPA but subject to displacement by an adequate state counterpart. See generally 42 U. S. C. § 6926 (requirements and procedures for EPA

General of Utah, *Denise Chancellor*, Assistant Attorney General, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Patrick O'Hare*, Senior Assistant Attorney General, *Kenneth O. Eikenberry*, Attorney General of Washington, *James K. Pharris*, Senior Assistant Attorney General, and *Jay J. Manning*, Assistant Attorney General; for the Natural Resources Defense Council by *Philip F. W. Ahrens III*; and for the National Governors' Association et al. by *Richard Ruda*, *Donald B. Verrilli, Jr.*, and *Barry Levenstam*.

approval of state hazardous-waste disposal permit plans); see also 40 CFR §§271.1–271.138 (1991) (detailed requirements for state plans).

This litigation began in 1986 when respondent State of Ohio sued petitioner Department of Energy (DOE) in Federal District Court for violations of state and federal pollution laws, including the CWA and RCRA, in operating its uranium-processing plant in Fernald, Ohio. Ohio sought, among other forms of relief, both state and federal civil penalties for past violations of the CWA and RCRA and of state laws enacted to supplant those federal statutes. See, *e. g.*, Complaint ¶ 64 (seeking penalties for violations of state law and of regulations issued pursuant to RCRA); *id.*, ¶ 115 (seeking penalties for violations of state law and of CWA).[1] Before the District Court ruled on DOE's motion for dismissal, the parties proposed a consent decree to settle all but one substantive claim,[2] and Ohio withdrew all outstanding claims for relief except its request for civil penalties for DOE's alleged past violations. See Consent Decree Between DOE and Ohio, App. 63. By a contemporaneous stipulation, DOE and Ohio agreed on the amount of civil penalties DOE will owe if it is found liable for them, see Stipulation Between DOE and Ohio, *id.*, at 87. The parties thus left for determination under the motion to dismiss only the issue we consider today: whether Congress has waived the National Government's sovereign immunity from liability for civil fines imposed for past failure to comply

[1] Federal- and state-law fines differ both as to their amounts and the sovereign that gets them, state-law fines going to the State, and federal-law fines going to the federal treasury. Ohio's state-law fines are currently lower than their federal-law counterparts. See generally Tr. of Oral Arg. 36–37, 49–52; see also Brief for Respondent Ohio 36. The parties have agreed that if DOE is liable for both federal- and state-law fines it will be assessed only for the latter. See Stipulation Between DOE and Ohio, ¶¶ 2.1, 3.1, App. 87, 89, 90.

[2] The parties agreed to stay one claim pending completion of a technical study. See Stipulation Between DOE and Ohio, App. 87–88.

with the CWA, RCRA, or state law supplanting the federal regulation.

DOE admits that the CWA and RCRA obligate a federal polluter, like any other, to obtain permits from EPA or the state permitting agency, see Brief for Petitioner DOE 24 (discussing CWA); *id.*, at 34–40 (discussing RCRA).[3] DOE also concedes that the CWA and RCRA render federal agencies liable for fines imposed to induce them to comply with injunctions or other judicial orders designed to modify behavior prospectively, which we will speak of hereafter as "coercive fines." See *id.*, at 19–20, and n. 10; see also n. 14, *infra*. The parties disagree only on whether the CWA and RCRA, in either their "federal-facilities"[4] or "citizen-suit"[5] sections, waive federal sovereign immunity from liability for fines,

---

[3] DOE's water-pollution permit was issued by EPA. See Complaint ¶ 29. DOE had no RCRA permit at the time Ohio commenced this suit, despite RCRA's requirement that facilities such as DOE's Fernald plant obtain one. See Complaint ¶¶ 50, 52, 57; Answer of Federal Defendants ¶ 57.

[4] 33 U. S. C. § 1323(a) (CWA); 42 U. S. C. § 6961 (RCRA). The federal-facilities sections of the CWA and RCRA govern the extent to which federally operated facilities, such as DOE's Fernald facility, are subject to the requirements, including fines, of both their respective statutes and EPA-approved, state-law regulation and enforcement programs.

[5] 33 U. S. C. § 1365(a) (CWA); 42 U. S. C. § 6972(a) (RCRA). The citizen-suit sections of the CWA and RCRA authorize private enforcement of the provisions of their respective statutes. Unlike the waivers in the federal-facilities sections, which set forth the scope of federal sovereign immunity from the requirements, including fines, of both their respective statutes and EPA-approved, state-law regulation and enforcement programs, the citizen-suit sections, to the extent they waive federal immunity at all, waive such immunity only from federal-law penalties.

States may sue the United States under the citizen-suit sections. See 33 U. S. C. § 1365(a) (any "citizen" may bring citizen suit under CWA); *id.*, § 1365(g) (defining "citizen" for purposes of CWA citizen-suit section as "person . . . having an interest which is or may be adversely affected"); *id.*, § 1362(5) (defining "person" for purposes of CWA to include a State); 42 U. S. C. § 6972 ("any person" may bring citizen suit under RCRA); *id.*, § 6903(15) ("person" for purposes of RCRA includes a State).

which we will refer to as "punitive," imposed to punish past violations of those statutes or state laws supplanting them.

The United States District Court for the Southern District of Ohio held that both statutes waived federal sovereign immunity from punitive fines, by both their federal-facilities and citizen-suit sections. 689 F. Supp. 760 (1988). A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed in part, holding that Congress had waived immunity from punitive fines in the CWA's federal-facilities section and RCRA's citizen-suit section, but not in RCRA's federal-facilities section. 904 F. 2d 1058 (1990).[6] Judge Guy dissented, concluding that neither the CWA's federal-facilities section nor RCRA's citizen-suit section sufficed to provide the waiver at issue. *Id.*, at 1065–1069.

In No. 90–1341, DOE petitioned for review insofar as the Sixth Circuit found any waiver of immunity from punitive fines, while in No. 90–1517, Ohio cross-petitioned on the holding that RCRA's federal-facilities section failed to effect such a waiver.[7] We consolidated the two petitions and granted certiorari, 500 U. S. 951 (1991).[8]

---

[6] The court held that its ruling on the CWA's federal-facilities section obviated any need to consider that statute's citizen-suit section. 904 F. 2d, at 1062.

[7] Ohio's petition also asked that if we reversed the lower court's conclusion on the CWA's federal-facilities section, we consider whether that statute's citizen-suit section contained a waiver, an issue the Sixth Circuit declined to reach.

[8] The Sixth Circuit's holding that the CWA's federal-facilities section waives federal sovereign immunity from punitive fines conflicts with the Ninth Circuit's conclusion that that section does not constitute such a waiver. See *California* v. *Department of Navy*, 845 F. 2d 222 (1988). One Court of Appeals has found such a waiver in the CWA's citizen-suit section. See *Sierra Club* v. *Lujan*, 931 F. 2d 1421 (CA10 1991). Two other Courts of Appeals agree with the Sixth Circuit that RCRA's federal-facilities section does not waive federal sovereign immunity from punitive fines. See *Mitzelfelt* v. *Department of Air Force*, 903 F. 2d 1293 (CA10 1990); *United States* v. *Washington*, 872 F. 2d 874 (CA9 1989). No other

II

We start with a common rule, with which we presume congressional familiarity, see *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496 (1991), that any waiver of the National Government's sovereign immunity must be unequivocal, see *United States* v. *Mitchell*, 445 U. S. 535, 538–539 (1980). "Waivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon* v. *United States*, 342 U. S. 25, 27 (1951), and not 'enlarge[d] . . . beyond what the language requires.' *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 686 (1927)." *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685–686 (1983). By these lights we examine first the two statutes' citizen-suit sections, which can be treated together because their relevant provisions are similar, then the CWA's federal-facilities section, and, finally, the corresponding section of RCRA.

A

So far as it concerns us, the CWA's citizen-suit section reads that

> "any citizen may commence a civil action on his own behalf—
>
> "(1) against any person (including . . . the United States . . .) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .
>
> . . . . .
>
> "The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order . . . as the case may be, and to apply any appro-

---

Court of Appeals appears to have considered whether RCRA's citizen-suit section constitutes such a waiver.

priate civil penalties under [33 U. S. C. § 1319(d)]." 33 U. S. C. § 1365(a).

The relevant part of the corresponding section of RCRA is similar:

> "[A]ny person may commence a civil action on his own behalf —
>
> "(1)(A) against any person (including . . . the United States) . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . .
>
> "(B) against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .
>
> . . . . .
>
> ". . . The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, . . . and to apply any appropriate civil penalties under [42 U. S. C. §§ 6928(a) and (g)]." 42 U. S. C. § 6972(a).

A State is a "citizen" under the CWA and a "person" under RCRA,[9] and is thus entitled to sue under these provisions.

Ohio and its *amici* argue that by specifying the United States as an entity subject to suit and incorporating the civil-

[9] See n. 5, *supra.*

penalties sections of the CWA and RCRA into their respective citizen-suit sections, "Congress could not avoid noticing that its literal language subject[ed] federal entities to penalties." Brief for Respondent Ohio 36; see also, *e. g.*, Brief for National Governors' Association et al. as *Amici Curiae* 14–16. It is undisputed that each civil-penalties provision authorizes fines of the punitive sort.

The effect of incorporating each statute's civil-penalties section into its respective citizen-suit section is not, however, as clear as Ohio claims. The incorporations must be read as encompassing all the terms of the penalty provisions, including their limitations, see, *e. g.*, *Engel* v. *Davenport*, 271 U. S. 33, 38 (1926) (adoption of earlier statute by reference "makes it as much a part of the later act as though it had been incorporated at full length"); see also 2B N. Singer, Sutherland on Statutory Construction § 51.08 (5th rev. ed. 1992), and significant limitations for present purposes result from restricting the applicability of the civil-penalties sections to "person[s]."[10] While both the CWA and RCRA define "person" to cover States, subdivisions of States, municipalities, and interstate bodies (and RCRA even extends the term to cover governmental corporations),[11] neither statute defines "person" to include the United States.[12] Its omission has to be

---

[10] See 33 U. S. C. § 1319(d) (CWA civil-penalties section); 42 U. S. C. §§ 6928(a), (g) (RCRA civil-penalties sections).

[11] See 33 U. S. C. § 1362(5) (defining "person" for purposes of CWA as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body"); 42 U. S. C. § 6903(15) (defining "person" for purposes of RCRA as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body").

[12] A subsection of RCRA dealing with a federal demonstration program tracking the disposal of medical waste does in fact require that "each department, agency, and instrumentality of the United States" "be treated as" a "person." See Medical Waste Tracking Act of 1988, § 2(a), Pub. L. 100–582, 102 Stat. 2955, 42 U. S. C. § 6992e(b). This broader provision,

seen as a pointed one when so many other governmental entities are specified, see 2A Singer, *supra*, § 47.23, a fact that renders the civil-penalties sections inapplicable to the United States.

Against this reasoning, Ohio argues that the incorporated penalty provisions' exclusion of the United States is overridden by the National Government's express inclusion as a "person" by each of the citizen-suit sections. There is, of course, a plausibility to the argument. Whether that plausibility suffices for the clarity required to waive sovereign immunity is, nonetheless, an issue we need not decide, for the force of Ohio's argument wanes when we look beyond the citizen-suit sections to the full texts of the respective statutes.

What we find elsewhere in each statute are various provisions specially defining "person" and doing so expressly for purposes of the entire section in which the term occurs. Thus, for example, "[f]or the purpose of this [CWA] section," 33 U. S. C. § 1321(a)(7) defines "person" in such a way as to exclude the various governmental entities included in the general definition of "person" in 33 U. S. C. § 1362(5).[13] Again, "[f]or the purpose of this section," § 1322(a)(8) defines "person" so as to exclude "an individual on board a public vessel" as well as the governmental entities falling within the general definition. Similarly in RCRA, "[f]or the purpose of . . . subchapter [IX]" the general definition of "person" is expanded to include "the United States Government," among other entities. 42 U. S. C. § 6991(6). Within each statute, then, there is a contrast between drafting that merely redefines "person" when it occurs within a particular clause or sentence and drafting that expressly alters the definition for any and all purposes of the entire section in

---

however, applies only "[f]or purposes of this Act," *ibid.*, which refers to the Medical Waste Tracking Act of 1988 itself, see 102 Stat. 2950.

[13] See n. 11, *supra*.

which the special definition occurs.[14] Such differences in treatment within a given statutory text are reasonably understood to reflect differences in meaning intended, see 2A Singer, *supra*, § 46.06, and the inference can only be that a special definition not described as being for purposes of the "section" or "subchapter" in which it occurs was intended to have the more limited application to its own clause or sentence alone. Thus, in the instances before us here, the inclusion of the United States as a "person" must go to the clauses subjecting the United States to suit, but no further.

This textual analysis passes the test of giving effect to all the language of the citizen-suit sections. Those sections' incorporations of their respective statutes' civil-penalties sections will have the effect of authorizing punitive fines when a polluter other than the United States is brought to court by a citizen, while the sections' explicit authorizations for suits against the United States will likewise be effective, since those sections concededly authorize coercive sanctions against the National Government.[15]

A clear and unequivocal waiver of anything more cannot be found; a broader waiver may not be inferred, see *Ruckels-*

---

[14] The dissent fails to appreciate this difference, arguing that § 1365(a) "states that any person, as used in that subdivision, includes the United States," *post*, at 633. That statement is simply incorrect; the citizen-suit section does no more than include the United States in the class of entities that may be the subject of a suit brought under this section. In stark contrast to the examples we have given, see n. 12, *supra*, § 1365(a) does not purport to apply the more expansive definition of "person" throughout the subsection; by its terms it speaks only to the first mention of "person."

[15] DOE explicitly concedes that such relief is available against the United States in the context of citizen suits pursuant to the CWA, see Brief for Petitioner DOE 33, and implicitly so concedes with regard to RCRA, see *id.*, at 40–41. DOE also concedes that both statutes' federal-facilities sections authorize imposition of injunctive-type relief against the National Government, see *id.*, at 19–20, and n. 10; see also *id.*, at 35. DOE concedes federal liability to such penalties without reference to the civil-penalties sections of the CWA or RCRA.

haus, 463 U. S., at 685–686. Ohio's reading is therefore to be rejected. See *United States* v. *Nordic Village, Inc.*, *ante*, at 37.

B

The relevant portion of the CWA's federal-facilities section provides that

> "[e]ach department, agency, or instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner . . . as any nongovernmental entity . . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. . . . [T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." 33 U. S. C. § 1323(a).

Ohio rests its argument for waiver as to punitive fines on two propositions: first, that the statute's use of the word "sanction" must be understood to encompass such fines, see Brief for Respondent Ohio 26–29; and, second, with respect to the fines authorized under a state permit program approved by EPA, that they "aris[e] under Federal law" despite their genesis in state statutes, and are thus within the scope of the "civil penalties" covered by the congressional waiver, *id.*, at 29–35.

1

Ohio's first proposition is mistaken. As a general matter, the meaning of "sanction" is spacious enough to cover not only what we have called punitive fines, but coercive ones as well, and use of the term carries no necessary implication that a reference to punitive fines is intended. One of the two dictionaries Ohio itself cites reflects this breadth. See Black's Law Dictionary 1341 (6th ed. 1990) (defining "sanction" as a "[p]enalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations. That part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance"). Ohio's other such source explicitly adopts the coercive sense of the term. See Ballentine's Law Dictionary 1137 (3d ed. 1969) (defining sanction in part as "[a] coercive measure").

Beyond the dictionaries, examples of usage in the coercive sense abound. See, *e. g.*, *Penfield Co. of Cal.* v. *SEC*, 330 U. S. 585, 590 (1947) (fines and imprisonment imposed as "coercive sanctions" when imposed to compel target "to do what the law made it his duty to do"); *Hicks* v. *Feiock*, 485 U. S. 624, 633–634, n. 6 (1988) ("sanction" in *Penfield* was civil because it was conditional; contemnor could avoid "sanction" by agreeing to comply with discovery order); Fed. Rule Civ. Proc. 37(b) (describing as "sanctions" various steps district court may take in response to noncompliance with discovery orders, including holding recalcitrant deponent in contempt); *United States* v. *Westinghouse Elec. Corp.*, 648 F. 2d 642, 649 (CA9 1981) (discussing "sanctions," imposed pursuant to Fed. Rule Civ. Proc. 37(b), consisting of fine for each day litigant remained in noncompliance with District Court's discovery order); *Latrobe Steel Co.* v. *United Steelworkers of America, Local 1537*, 545 F. 2d 1336, 1344 (CA3 1976) ("Coercive sanctions . . . look to the future and are designed to aid the plaintiff by bringing a defiant party into compliance with the

court order or by assuring that a potentially contumacious party adheres to an injunction by setting forth in advance the penalties the court will impose if the party deviates from the path of obedience"); *Vincent* v. *Preiser*, 175 W. Va. 797, 803, 338 S. E. 2d 398, 403 (1985) (discussing contempt "sanctions" imposed "to compel compliance with a court order"); *Maltaman* v. *State Bar of Cal.*, 43 Cal. 3d 924, 936, 741 P. 2d 185, 189–190 (1987) (describing as "sanctions" daily fine imposed on party until it complied with order directing it to transfer certain property); *Labor Relations Comm'n* v. *Fall River Educators' Assn.*, 382 Mass. 465, 475–476, 416 N. E. 2d 1340, 1347 (1981) (affirming propriety of imposition of "coercive contempt sanction"); Cal. Civ. Proc. Code Ann. § 2023(b)(4) (West Supp. 1992) (authorizing, in response to litigant's failure to obey discovery order, "terminating sanction[s]," including "contempt sanction[s]" and orders staying further proceedings by recalcitrant litigant). Cf. 42 U. S. C. § 6992e(a) (waiving federal medical-waste disposal facilities' sovereign immunity from various requirements, including such "sanctions as may be imposed by a court to enforce [injunctive] relief"); *id.*, § 6961 (using same language to waive other federal facilities' immunity from RCRA provisions). Thus, resort to a "sanction" carries no necessary implication of the punitive as against the coercive.

The term's context, of course, may supply a clarity that the term lacks in isolation, see, *e. g.*, *Shell Oil Co.* v. *Iowa Dept. of Revenue*, 488 U. S. 19, 26 (1988). It tends to do so here, but once again the clarity so found cuts against Ohio's position. The word "sanction" appears twice in § 1323(a), each time within the phrase "process and sanction[s]." The first sentence subjects Government agencies to "process and sanctions," while the second explains that the Government's corresponding liability extends to "any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."

Three features of this context are significant. The first is the separate statutory recognition of three manifestations of governmental power to which the United States is subjected: substantive and procedural requirements; administrative authority; and "process and sanctions," whether "enforced" in courts or otherwise. Substantive requirements are thus distinguished from judicial process, even though each might require the same conduct, as when a statute requires and a court orders a polluter to refrain from discharging without a permit. The second noteworthy feature is the conjunction of "sanction[s]" not with the substantive "requirements," but with "process," in each of the two instances in which "sanction" appears. "Process" normally refers to the procedure and mechanics of adjudication and the enforcement of decrees or orders that the adjudicatory process finally provides. The third feature to note is the statute's reference to "process and sanctions" as "enforced" in courts or otherwise. Whereas we commonly understand that "requirements" may be enforced either by backward-looking penalties for past violations or by the "process" of forward-looking orders enjoining future violations, such forward-looking orders themselves are characteristically given teeth by equity's traditional coercive sanctions for contempt: fines and bodily commitment imposed pending compliance or agreement to comply. The very fact, then, that the text speaks of sanctions in the context of enforcing "process" as distinct from substantive "requirements" is a good reason to infer that Congress was using "sanction" in its coercive sense, to the exclusion of punitive fines.

2

The last relevant passage of § 1323(a), which provides that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court," is not to the contrary. While this proviso is unlike the preceding

text in that it speaks of "civil penalties," not "sanctions," it is obviously phrased to clarify or limit the waiver preceding it. Here our concern is with its clarifying function (leaving its limiting effect until later), and it must be said that as a clarifier the proviso speaks with an uncertain voice. To be sure, the second modifier of "civil penalties" at least makes it plain that the term (like "sanction," to which it relates) must include a coercive penalty, since "civil penalties" are exemplified by those "imposed by a State or local court to enforce an order or the process of such court." To this extent, then, the proviso serves to confirm the reading we reached above.

The role of the first modifier is problematical, however. On the one hand, it tugs toward a more expansive reading of "civil penalties." If by using the phrase "civil penalties arising under Federal law" Congress meant nothing more than coercive fines arising under federal law, it would have been simpler to describe all such penalties as imposed to enforce an order or process, whether of a local, state, or federal court. Thus, the first modifier suggests that the civil penalties arising under federal law may indeed include the punitive along with the coercive. Nevertheless, a reading expansive enough to reflect a waiver as to punitive fines would raise a new and troublesome question about the source of legal authority to impose such a fine. As far as federal law is concerned, the only available source of authority to impose punitive fines is the civil-penalties section, § 1319(d). But, as we have already seen, that section does not authorize liability against the United States, since it applies only against "persons," from whom the United States is excluded.

Ohio urges us to find a source of authority good against the United States by reading "arising under Federal law" to include penalties prescribed by state statutes approved by EPA and supplanting the CWA. Ohio argues for treating a state statute as providing penalties "arising under Federal law" by stressing the complementary relationship between

the relevant state and federal statutes and the role of such state statutes in accomplishing the purpose of the CWA. This purpose, as Ohio states it, is "to encourage compliance with comprehensive, federally approved water pollution programs while shielding federal agencies from unauthorized penalties." Brief for Respondent Ohio 34–35. Ohio asserts that "federal facility compliance . . . cannot be . . . accomplished without the [punitive] penalty deterrent." *Id.*, at 35.

The case for such pessimism is not, however, self-evident. To be sure, an agency of the Government may break the law where it might have complied voluntarily if it had faced the prospect of punitive fines for past violations. But to say that its "compliance cannot be . . . accomplished" without such fines is to assume that without sanctions for past conduct a federal polluter can never be brought into future compliance, that an agency of the National Government would defy an injunction backed by coercive fines and even a threat of personal commitment. The position seems also to ignore the fact that once such fines start running they can be every dollar as onerous as their punitive counterparts; it could be a very expensive mistake to plan on ignoring the law indefinitely on the assumption that contumacy would be cheap.

Nor does the complementary relationship between state and federal law support Ohio's claim that state-law fines thereby "arise under Federal law." Plain language aside, the far more compelling interpretative case rests on the best known statutory use of the phrase "arising under federal law," appearing in the grant of federal-question jurisdiction to the courts of the United States. See 28 U. S. C. § 1331. There, we have read the phrase "arising under" federal law to exclude cases in which the plaintiff relies on state law, even when the State's exercise of power in the particular circumstances is expressly permitted by federal law. See, *e. g.*, *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 116 (1936) (suit over state taxation of nationally chartered bank does not arise under federal law even though such taxa-

tion would not be possible without federal approval); *International Bridge Co.* v. *New York*, 254 U. S. 126, 133 (1920) (congressional approval of construction of bridge by state-chartered company does not make federal law the source of right to build bridge).[16] Congress' use of the same language in § 1323(a) indicates a likely adoption of our prior interpretation of that language. See, *e. g.*, *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 284–285 (1987) (interpreting statute based on previous interpretation of same language in another statute); *Northcross* v. *Memphis Bd. of Education*, 412 U. S. 427, 428 (1973) *(per curiam)* (similarity of language in two statutes "strong indication that [they] should be interpreted *pari passu*"). The probability is enough to answer Ohio's argument that "arising under Federal law" in § 1323(a) is broad enough to cover provisions of state statutes approved by a federal agency but nevertheless applicable *ex proprio vigore*.

Since Ohio's argument for treating state-penalty provisions as arising under federal law thus fails, our reading of the last-quoted sentence from § 1323(a) leaves us with an unanswered question and an unresolved tension between closely related statutory provisions. The question is still what Congress could have meant in using a seemingly expansive phrase like "civil penalties arising under Federal law." Perhaps it used it just in case some later amendment might waive the Government's immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already. Perhaps

---

[16] Of course, the phrase "arising under" federal law appears in Article III, § 2, of the Constitution, where it has received a broader construction than in its statutory counterpart. See *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 494–495 (1983). Ohio, however, has offered no reason to believe Congress intended this broader reading rather than the narrower statutory reading. Even assuming an equal likelihood for each intent, our rule requiring a narrow construction of waiver language tips the balance in favor of the narrow reading.

someone was careless. The question has no satisfactory answer.

We do, however, have a response satisfactory for sovereign immunity purposes to the tension between a proviso suggesting an apparently expansive but uncertain waiver and its antecedent text that evinces a narrower waiver with greater clarity. For under our rules that tension is resolved by the requirement that any statement of waiver be unequivocal: as against the clear waiver for coercive fines the indication of a waiver as to those that are punitive is less certain. The rule of narrow construction therefore takes the waiver no further than the coercive variety.

C

We consider, finally, the federal-facilities section of RCRA, which provides, in relevant part, that the National Government

> "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) . . . in the same manner, and to the same extent, as any person is subject to such requirements . . . . Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief." 42 U. S. C. § 6961.

Ohio and its *amici* stress the statutory subjection of federal facilities to "all . . . requirements," which they would have us read as an explicit and unambiguous waiver of federal sovereign immunity from punitive fines. We, however, agree with the Tenth Circuit that "all . . . requirements" "can reasonably be interpreted as including substantive standards and the means for implementing those standards, but exclud-

ing punitive measures." *Mitzelfelt* v. *Department of Air Force*, 903 F. 2d 1293, 1295 (1990).

We have already observed that substantive requirements can be enforced either punitively or coercively, and the Tenth Circuit's understanding that Congress intended the latter finds strong support in the textual indications of the kinds of requirements meant to bind the Government. Significantly, all of them refer either to mechanisms requiring review for substantive compliance (permit and reporting requirements) or to mechanisms for enforcing substantive compliance in the future (injunctive relief and sanctions to enforce it). In stark contrast, the statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future.

The drafters' silence on the subject of punitive sanctions becomes virtually audible after one reads the provision's final sentence, waiving immunity "from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief." The fact that the drafters' only specific reference to an enforcement mechanism described "sanction" as a coercive means of injunctive enforcement bars any inference that a waiver of immunity from "requirements" somehow unquestionably extends to punitive fines that are never so much as mentioned.[17]

---

[17] We also reject Ohio's argument purporting to rest on *Hancock* v. *Train*, 426 U. S. 167 (1976). In *Hancock* we determined that, as then written, § 118 of the Clean Air Act, 42 U. S. C. § 1857f (1970 ed.), did not require federal facilities to obtain state pollution permits as a condition of continued operation. The relevant portion of § 1857 required the National Government to "comply with Federal, State, interstate, and local requirements respecting control . . . of air pollution." Ohio and its *amici* stress the point in our analysis where we found it significant that § 1857 did not require federal compliance with "*all* federal, state, interstate, and local

III

The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in part and dissenting in part.

These cases concern a uranium-processing plant which, the Government concedes, has "contaminated the soil, air and surface waters" of Fernald, Ohio, with radioactive materials, "exceeded certain of the effluent limitations set forth" in its water pollution permit, and "failed to construct portions of the water pollution control facilities in accordance" with the permit. Answer ¶¶ 28, 33.

The situation at the Fernald plant is not an aberration. The Department of Energy (DOE) estimates that taxpayers may pay $40 to $70 billion during the next 20 years to clean

---

requirements," or with "*all* requirements of the applicable state implementation plan." See 426 U. S., at 182 (emphasis in original). They read our opinion as drawing a distinction between substantive and procedural requirements, and as interpreting § 1857 as not waiving federal immunity from procedural requirements, the group in which we classified the state permit programs. Ohio and its *amici* conclude that the drafters of RCRA took our observations in *Hancock* to heart, and, seeking to waive federal sovereign immunity for all purposes, including liability for civil punitive fines, waived immunity for "all . . . requirements, both substantive and procedural." 42 U. S. C. § 6961; see Brief for Respondent Ohio 41; see also, *e. g.*, Brief for State of California et al. as *Amici Curiae* 21.

The answer to this is twofold. Indications of the breadth of the Government's obligation to comply with substantive or procedural requirements dealt with in *Hancock* do not necessarily translate into indications that the Government's subjection to mechanisms for enforcing those obligations extends to punitive as well as to coercive sanctions. In any event, if Congress had in fact entertained the intention Ohio suggests, it would hardly have avoided any example of punitive fines at the same time as it expressly mentioned the coercive injunctive remedy.

up or contain the contamination at its facilities.[1] Federal facilities fail to comply with the Clean Water Act (CWA), 33 U. S. C. § 1251 *et seq.*, twice as frequently as private industry.[2] And the compliance rate of the Departments of Defense and Energy with the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U. S. C. § 6901 *et seq.*, is 10 to 15 percent lower than that of private industry.[3]

In an effort to compel Government agencies to adhere to the environmental laws under which private industry must operate, Congress waived sovereign immunity for civil penalties in the federal facilities and citizen suit provisions of the CWA, 33 U. S. C. §§ 1323, 1365(a), and in the citizen suit provision of the RCRA, 42 U. S. C. § 6972(a). Today, the majority thwarts this effort by adopting "an unduly restrictive interpretation" of both statutes and writing the waivers out of existence. *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 222 (1945); *Block* v. *North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U. S. 273, 287 (1983). In so doing, the majority ignores the "unequivocally expressed" intention of Congress, *United States* v. *Nordic Village, Inc.*, *ante*, at 33; *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980), and deprives the States of a powerful weapon in combating federal agencies that persist in despoiling the environment.

I

It is axiomatic that a statute should be read as a whole. 2A N. Singer, Sutherland on Statutory Construction § 46.05 (5th ed. 1992). When the federal facilities and citizen suit

---

[1] Cleanup at Federal Facilities: Hearing on H. R. 765 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 101st Cong., 1st Sess., Ser. No. 101–4, p. 44 (1989).

[2] U. S. General Accounting Office, Report to Congressional Requestors: Water Pollution, Stronger Enforcement Needed to Improve Compliance of Federal Facilities 3 (1988).

[3] H. R. Rep. No. 102–111, p. 3 (1991).

provisions of the CWA are so read, the conclusion becomes inescapable that Congress intended to waive sovereign immunity for civil penalties under the statute.

The federal facilities provision, 33 U. S. C. § 1323(a), see *ante*, at 620, both establishes the Government's duty to comply with the substantive and procedural requirements of the CWA and explicitly waives immunity for civil penalties. The first part of the federal facilities provision states that the Federal Government is subject to "any process and sanction," regardless of the court in which it is enforced.

The majority devotes three pages of its opinion to a tortured discussion of whether subjecting the Government to "process and sanction" encompasses liability for civil penalties. See *ante*, at 621–623. Rather than engaging in these analytic gymnastics, the Court needed to do nothing more than read the rest of the federal facilities provision. It clearly states:

> "[T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." 33 U. S. C. § 1323(a).

Obviously, Congress intended the United States to be liable for civil penalties. The plain language of the statute says so. Therefore, the broad term "sanctions" used earlier in the same subsection must include these penalties. Any other reading would contravene the "ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon* v. *United States*, 494 U. S. 152, 171 (1990) (SCALIA, J., concurring in judgment); *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, 472 U. S. 237, 249 (1985); *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979).

The question, then, is not whether Congress has waived federal immunity for civil penalties. The waiver here unambiguously reached those claims for civil penalties "arising

under" federal law. The critical inquiry is under what circumstances civil penalties arise under federal law.

A

Ohio contends that it is entitled to recover civil penalties on two different claims: the first brought under the CWA itself, through its citizen suit provision, 33 U. S. C. § 1365(a), and the second under the Ohio water pollution laws that arise under the CWA's distinctive mechanism allowing States to administer CWA enforcement within their own boundaries. Ohio Rev. Code Ann. § 6111.09 (Supp. 1987). I agree that the waiver of immunity covers both types of claims.

1

First, the CWA waives sovereign immunity for civil penalty claims brought under the Act's citizen suit clause. 33 U. S. C. § 1365(a). See *ante*, at 615–616. That section unambiguously provides authority to sue "any person (including . . . the United States . . .)" and to recover "any appropriate civil penalties" under the civil penalties clause of the CWA enforcement provision, § 1319(d). It is impossible to fathom a clearer statement that the United States may be sued and found liable for civil penalties. The enforcement provision lists those violations that may be subject to a civil penalty, sets a ceiling on the size of the penalty, and lists factors that the court should consider in determining the amount of a penalty. *Ibid.*

Nevertheless, the majority concludes that this straightforward approach is not sufficient to waive immunity. The Court latches onto the fact that the enforcement provision does not include its own definition of "person" and that the CWA's general purpose definition of the word "person" does not include the United States. § 1362(5).[4] Again, there is a

[4] Section 1362(5) states: "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."

short answer to this claim. The statute says, in plain English, that its general definitions apply "[e]xcept as otherwise specifically provided." § 1362. The citizen suit provision is one of the exceptions to the general rule; it states that any person, as used in that subdivision, includes the United States. § 1365(a). Certainly this special definition applies to the civil penalty enforcement provisions it incorporates.

To conclude otherwise is to resort to "ingenuity to create ambiguity" that simply does not exist in this statute. *Rothschild* v. *United States*, 179 U. S. 463, 465 (1900).

2

The CWA also waives immunity for civil penalties arising under state laws enacted to allow local administration of the CWA permit program. The majority rejects this proposition by relying on cases in which the Court has held that state laws approved by the Federal Government do not "arise under" federal law. See *ante*, at 625–626. But these cases are inapposite because the CWA regime goes far beyond simple federal approval of state action. Instead, the Act establishes a distinctive variety of cooperative federalism.

As we recently explained: "The Clean Water Act anticipates a partnership between the States and the Federal Government . . . ." *Arkansas* v. *Oklahoma*, *ante*, at 101. To effectuate this partnership, the CWA authorizes the Environmental Protection Agency (EPA) to issue pollution discharge permits, 33 U. S. C. § 1342, but provides that a State may "administer" its own permit system if it complies with detailed statutory and regulatory requirements. 33 U. S. C. § 1342(b); 40 CFR §§ 123.1–123.64 (1991). A State that seeks to "administer" a permitting program is required to adopt a system of civil penalties. 33 U. S. C. § 1342(b)(7). Federal regulations establish the minimum size of the penalties and mandate how, and when, they must be imposed. 40 CFR §§ 123.27(a)(3)(i), 123.27(b)(1), 123.27(c) (1991).

Even when a State obtains approval to administer its permitting system, the Federal Government maintains an extraordinary level of involvement. EPA reviews state water quality standards. 33 U. S. C. § 1313(c). It retains authority to object to the issuance of particular permits, § 1342(d)(2), to monitor the state program for continuing compliance with federal directives, § 1342(c), and even to enforce the terms of state permits when the State has not instituted enforcement proceedings, § 1319(a).

Under this unusual statutory structure, compliance with a state-administered permit is deemed compliance with the CWA. § 1342(k). Indeed, in *EPA* v. *Oklahoma*, decided together with *Arkansas* v. *Oklahoma*, the EPA asserted that "the showing necessary to determine under the CWA whether there is compliance with any particular state [pollution] standard is itself *a matter of federal, not state, law.*" Brief for Petitioner, O. T. 1991, No. 90–1266, p. 18, n. 21 (emphasis added). Cf. *Arkansas* v. *Oklahoma*, *ante*, at 110 (recognizing the "federal character" of state pollution standards in interstate pollution controversy). This conclusion is not surprising, since the citizen suit provision of the CWA authorizes any citizen to sue under federal law for a "violation of . . . an order issued by . . . a State with respect to [any effluent] standard or limitation . . . ." 33 U. S. C. § 1365(a).

Given the structure of the CWA, it is apparent that the "arising under" limitation on the waiver of sovereign immunity was not intended to protect the Federal Government from exposure to penalties under state laws that merely provide for the administration of a CWA permit system. Instead, the limitation shields the Government from liability under state laws that have not been subject to initial EPA review and ongoing agency supervision.[5] Only by resorting

[5] States may adopt more rigorous water quality standards than those established under the CWA. EPA regulations provide that a State is not precluded from:

to "an unduly restrictive interpretation" of the CWA and focusing on the "arising under" language in isolation can the majority reach a contrary result. *Canadian Aviator*, 324 U. S., at 222.

B

Because of its determination to find that civil penalties are not available against the Government, the majority paints itself into a corner. The Court acknowledges that its distortion of the statute leaves the phrase "civil penalties arising under Federal law" devoid of meaning. See *ante*, at 626–627. But rather than reading the CWA as Congress wrote it and recognizing that it effects a waiver of immunity, the majority engages in speculation about why Congress could not have meant what it unambiguously said:

> "Perhaps it used [civil penalties arising under federal law] just in case some later amendment might waive the Government's immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already. Perhaps someone was careless." *Ibid.*

It is one thing to insist on an unequivocal waiver of sovereign immunity. It is quite another "to impute to Congress a desire for incoherence" as a basis for rejecting an explicit waiver. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 394 (1939); *Franchise Tax Bd. of California* v. *Postal Service*, 467 U. S. 512, 524 (1984). Cf. *Canadian Aviator, supra*, at 225. That is what the majority does today. "Surely the interest in requiring the Congress

---

"(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

"(2) Operating a program with a greater scope of coverage than that required under this part. *If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.*" 40 CFR §123.1(h)(i) (1991) (emphasis added).

to draft its legislation with greater clarity or precision does not justify a refusal to make a good-faith effort to ascertain the actual meaning of the message it tried to convey in a statutory provision that is already on the books." *Nordic Village, ante,* at 45 (STEVENS, J., dissenting).

The unambiguous language of the federal facilities and citizen suit provisions of the CWA clearly contemplate a waiver of immunity as to suit for civil damages, and "once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'" *Ardestani* v. *INS,* 502 U. S. 129, 137 (1991), quoting *United States* v. *Kubrick,* 444 U. S. 111, 118 (1979); *Irwin* v. *Department of Veterans Affairs,* 498 U. S. 89, 94 (1990).

II

Turning to the RCRA, I agree with the majority and with the Court of Appeals that the RCRA federal facilities provision does not effect an unambiguous waiver of immunity from civil penalties, 42 U. S. C. § 6961. See *ante,* at 627–628. The section makes no reference to civil penalties and, instead, waives immunity for "any such injunctive relief." This language comports with the Government's claim that the waiver is intended to reach only coercive and not punitive sanctions. The provision certainly does not unequivocally encompass civil penalties. Therefore, I join Part II–C of the Court's opinion.

However, I would find a waiver under RCRA's citizen suit provision, 42 U. S. C. § 6972(a), see *ante,* at 616, which is very similar to the citizen suit provision in the CWA, for the reasons I have explained above. See Part I–A–1, *supra.*

III

The job of this Court is to determine what a statute says, not whether it could have been drafted more artfully. In these cases, the federal facilities and citizen suit provisions of

the CWA and the citizen suit provision of the RCRA unambiguously waive the Federal Government's immunity from civil penalties. That is all the law requires.

Syllabus

TAYLOR *v.* FREELAND & KRONZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91–571. Argued March 2, 1992—Decided April 21, 1992

On the schedule she filed pursuant to § 522*(l)* of the Bankruptcy Code, debtor Davis listed as exempt property the expected proceeds from her pending employment discrimination suit. Petitioner Taylor, the trustee of Davis' bankruptcy estate, did not object to the claimed exemption within the 30-day period allowed by Federal Rule of Bankruptcy Procedure 4003(b). However, upon later learning that the discrimination suit had been settled for a substantial sum, Taylor filed a complaint in the Bankruptcy Court against respondents, Davis' attorneys in that suit, demanding that they turn over settlement proceeds as property of Davis' estate. Concluding that Davis had no statutory basis for claiming the proceeds as exempt, the court ordered respondents to "return" to Taylor a sum sufficient to pay off all of Davis' unpaid creditors, and the District Court affirmed. The Court of Appeals reversed, holding that the Bankruptcy Court had erred because Davis had claimed the money in question as exempt, and Taylor had failed to object to the claimed exemption in a timely manner.

Held: A trustee may not contest the validity of a claimed exemption after the Rule 4003(b) 30-day period has expired, even though the debtor had no colorable basis for claiming the exemption. Pp. 642–646.

(a) Because the parties agree that Davis did not have a statutory right to exempt more than a small portion of the lawsuit proceeds, let alone the full amount, Taylor apparently could have made a valid objection under § 522*(l)*—which provides, *inter alia*, that "property claimed as exempt . . . is exempt" "[u]nless a party in interest objects," but does not specify the time for objecting—if he had acted promptly under Rule 4003(b)—which establishes the 30-day objections period for trustees and creditors "unless, within such period, further time is granted by the court." P. 642.

(b) However, Taylor's failure to promptly object precludes him from challenging the validity of the exemption at this time, regardless of whether or not Davis had a colorable statutory basis for claiming it. By negative implication, Rule 4003(b) indicates that a trustee may not object after 30 days unless a further extension of time is granted. Because no such extension was allowed by the Bankruptcy Court in this case, § 522*(l)* has made the settlement proceeds exempt. This Court

rejects Taylor's argument that, in order to discourage debtors from claiming meritless exemptions merely in hopes that no one will object, a court may invalidate an exemption after expiration of the 30-day period where the debtor did not have a good-faith or reasonably disputable basis for claiming it. To the extent that the various Code and Rules provisions aimed at penalizing debtors and their attorneys for improper conduct fail to limit bad-faith exemption claims, Congress, rather than this Court, may rewrite § 522*(l)* to include a good-faith requirement. Pp. 643–645.

(c) Taylor's assertion that § 105(a) of the Code permits courts to disallow exemptions not claimed in good faith despite the absence of timely objections to such exemptions will not be considered by this Court, since that argument was first raised in Taylor's opening brief on the merits and was neither raised nor resolved in the lower courts. Pp. 645–646.

938 F. 2d 420, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 646.

Timothy B. Dyk argued the cause for petitioner. With him on the briefs were *Stephen J. Goodman*, *Peter M. Lieb*, and *Gary W. Short*.

Phillip S. Simon argued the cause for respondents. With him on the brief was *Kenneth P. Simon*.*

JUSTICE THOMAS delivered the opinion of the Court.

Section 522*(l)* of the Bankruptcy Code requires a debtor to file a list of the property that the debtor claims as statutorily exempt from distribution to creditors. Federal Rule of Bankruptcy Procedure 4003 affords creditors and the bankruptcy trustee 30 days to object to claimed exemptions. We must decide in this case whether the trustee may contest the validity of an exemption after the 30-day period if the debtor had no colorable basis for claiming the exemption.

**Gary Klein* and *Daniel L. Haller* filed a brief for the Mon Valley Unemployed Committee et al. as *amici curiae* urging affirmance.

I

The debtor in this case, Emily Davis, declared bankruptcy while she was pursuing an employment discrimination claim in the state courts. The relevant proceedings began in 1978 when Davis filed a complaint with the Pittsburgh Commission on Human Relations. Davis alleged that her employer, Trans World Airlines (TWA), had denied her promotions on the basis of her race and sex. The Commission held for Davis as to liability but did not calculate the damages owed by TWA. The Pennsylvania Court of Common Pleas reversed the Commission, but the Pennsylvania Commonwealth Court reversed that court and reinstated the Commission's determination of liability. TWA next appealed to the Pennsylvania Supreme Court.

In October 1984, while that appeal was pending, Davis filed a Chapter 7 bankruptcy petition. Petitioner, Robert J. Taylor, became the trustee of Davis' bankruptcy estate. Respondents, Wendell G. Freeland, Richard F. Kronz, and their law firm, represented Davis in the discrimination suit. On a schedule filed with the Bankruptcy Court, Davis claimed as exempt property the money that she expected to win in her discrimination suit against TWA. She described this property as "Proceeds from lawsuit—[Davis] v. TWA" and "Claim for lost wages" and listed its value as "unknown." App. 18.

Performing his duty as a trustee, Taylor held the required initial meeting of creditors in January 1985. See 11 U. S. C. § 341; Fed. Rule Bkrtcy. Proc. 2003(a). At this meeting, respondents told Taylor that they estimated that Davis might win $90,000 in her suit against TWA. Several days after the meeting, Taylor wrote a letter to respondents telling them that he considered the potential proceeds of the lawsuit to be property of Davis' bankruptcy estate. He also asked respondents for more details about the suit. Respondents described the procedural posture of the case and expressed optimism that they might settle with TWA for $110,000.

Taylor decided not to object to the claimed exemption. The record reveals that Taylor doubted that the lawsuit had any value. Taylor at one point explained: "I have had past experience in examining debtors . . . [.] [M]any of them . . . indicate they have potential lawsuits. . . . [M]any of them do not turn out to be advantageous and . . . many of them might wind up settling far within the exemption limitation." App. 52. Taylor also said that he thought Davis' discrimination claim against TWA might be a "nullity." *Id.*, at 58.

Taylor proved mistaken. In October 1986, the Pennsylvania Supreme Court affirmed the Commonwealth Court's determination that TWA had discriminated against Davis. In a subsequent settlement of the issue of damages, TWA agreed to pay Davis a total of $110,000. TWA paid part of this amount by issuing a check made to both Davis and respondents for $71,000. Davis apparently signed this check over to respondents in payment of their fees. TWA paid the remainder of the $110,000 by other means. Upon learning of the settlement, Taylor filed a complaint against respondents in the Bankruptcy Court. He demanded that respondents turn over the money that they had received from Davis because he considered it property of Davis' bankruptcy estate. Respondents argued that they could keep the fees because Davis had claimed the proceeds of the lawsuit as exempt.

The Bankruptcy Court sided with Taylor. It concluded that Davis had "no statutory basis" for claiming the proceeds of the lawsuit as exempt and ordered respondents to "return" approximately $23,000 to Taylor, a sum sufficient to pay off all of Davis' unpaid creditors. *In re Davis*, 105 B. R. 288 (Bkrtcy. Ct. WD Pa. 1989). The District Court affirmed, *In re Davis*, 118 B. R. 272 (WD Pa. 1990), but the Court of Appeals for the Third Circuit reversed, 938 F. 2d 420 (1991). The Court of Appeals held that the Bankruptcy Court could not require respondents to turn over the money because Davis had claimed it as exempt, and Taylor had failed to

object to the claimed exemption in a timely manner. We granted certiorari, 502 U. S. 976 (1991), and now affirm.

II

When a debtor files a bankruptcy petition, all of his property becomes property of a bankruptcy estate. See 11 U. S. C. § 541. The Code, however, allows the debtor to prevent the distribution of certain property by claiming it as exempt. Section 522(b) allowed Davis to choose the exemptions afforded by state law or the federal exemptions listed in § 522(d). Section 522*(l)* states the procedure for claiming exemptions and objecting to claimed exemptions as follows:

> "The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt."

Although § 522*(l)* itself does not specify the time for objecting to a claimed exemption, Federal Rule of Bankruptcy Procedure 4003(b) provides in part:

> "The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) . . . unless, within such period, further time is granted by the court."

In this case, as noted, Davis claimed the proceeds from her employment discrimination lawsuit as exempt by listing them in the schedule that she filed under § 522*(l)*. The parties agree that Davis did not have a right to exempt more than a small portion of these proceeds either under state law or under the federal exemptions specified in § 522(d). Davis in fact claimed the full amount as exempt. Taylor, as a result, apparently could have made a valid objection under § 522*(l)* and Rule 4003 if he had acted promptly. We hold, however, that his failure to do so prevents him from challenging the validity of the exemption now.

A

Taylor acknowledges that Rule 4003(b) establishes a 30-day period for objecting to exemptions and that § 522*(l)* states that "[u]nless a party in interest objects, the property claimed as exempt . . . is exempt." He argues, nonetheless, that his failure to object does not preclude him from challenging the exemption at this time. In Taylor's view, § 522*(l)* and Rule 4003(b) serve only to narrow judicial inquiry into the validity of an exemption after 30 days, not to preclude judicial inquiry altogether. In particular, he maintains that courts may invalidate a claimed exemption after expiration of the 30-day period if the debtor did not have a good-faith or reasonably disputable basis for claiming it. In this case, Taylor asserts, Davis did not have a colorable basis for claiming all of the lawsuit proceeds as exempt and thus lacked good faith.

Taylor justifies his interpretation of § 522*(l)* by arguing that requiring debtors to file claims in good faith will discourage them from claiming meritless exemptions merely in hopes that no one will object. Taylor does not stand alone in this reading of § 522(b). Several Courts of Appeals have adopted the same position upon similar reasoning. See *In re Peterson*, 920 F. 2d 1389, 1393–1394 (CA8 1990); *In re Dembs*, 757 F. 2d 777, 780 (CA6 1985); *In re Sherk*, 918 F. 2d 1170, 1174 (CA5 1990).

We reject Taylor's argument. Davis claimed the lawsuit proceeds as exempt on a list filed with the Bankruptcy Court. Section 522*(l)*, to repeat, says that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." Rule 4003(b) gives the trustee and creditors 30 days from the initial creditors' meeting to object. By negative implication, the Rule indicates that creditors may not object after 30 days "unless, within such period, further time is granted by the court." The Bankruptcy Court did not extend the 30-day period. Section 522*(l)* therefore has made the property exempt. Taylor cannot contest the ex-

emption at this time whether or not Davis had a colorable statutory basis for claiming it.

Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality. In this case, despite what respondents repeatedly told him, Taylor did not object to the claimed exemption. If Taylor did not know the value of the potential proceeds of the lawsuit, he could have sought a hearing on the issue, see Rule 4003(c), or he could have asked the Bankruptcy Court for an extension of time to object, see Rule 4003(b). Having done neither, Taylor cannot now seek to deprive Davis and respondents of the exemption.

Taylor suggests that our holding will create improper incentives. He asserts that it will lead debtors to claim property exempt on the chance that the trustee and creditors, for whatever reason, will fail to object to the claimed exemption on time. He asserts that only a requirement of good faith can prevent what the Eighth Circuit has termed "exemption by declaration." *Peterson*, *supra*, at 1393. This concern, however, does not cause us to alter our interpretation of § 522*(l)*.

Debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. See, *e. g.*, 11 U. S. C. § 727(a)(4)(B) (authorizing denial of discharge for presenting fraudulent claims); Rule 1008 (requiring filings to "be verified or contain an unsworn declaration" of truthfulness under penalty of perjury); Rule 9011 (authorizing sanctions for signing certain documents not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); 18 U. S. C. § 152 (imposing criminal penalties for fraud in bankruptcy cases). These provisions may limit bad-faith claims of exemptions by debtors. To the extent that they do not, Congress may enact comparable provisions to address the difficulties that Taylor predicts will

follow our decision. We have no authority to limit the application of § 522*(l)* to exemptions claimed in good faith.

B

Taylor also asserts that courts may consider the validity of the exemption under a different provision of the Bankruptcy Code, 11 U. S. C. § 105(a), despite his failure to object in a timely manner. That provision states:

> "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. *No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action* or making any determination necessary or appropriate to enforce or implement court orders or rules, or *to prevent an abuse of process.*" *Ibid.* (emphasis added).

Although Taylor stresses that he is not asserting that courts in bankruptcy have broad authorization to do equity in derogation of the Code and Rules, he maintains that § 105 permits courts to disallow exemptions not claimed in good faith. Several courts have accepted this position. See, *e. g.*, *Ragsdale* v. *Genesco, Inc.*, 674 F. 2d 277, 278 (CA4 1982); *In re Staniforth*, 116 B. R. 127, 131 (Bkrtcy. Ct. WD Wis. 1990); *In re Budinsky*, No. 90–01099, 1991 WL 105640 (WD Pa., June 10, 1991).

We decline to consider § 105(a) in this case because Taylor raised the argument for the first time in his opening brief on the merits. Our Rule 14.1(a) makes clear that "[o]nly the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court," and our Rule 24.1(a) states that a brief on the merits should not "raise additional questions or change the substance of the questions already presented" in the petition. See *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992). In addition, we have

said that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)*. These principles help to maintain the integrity of the process of certiorari. Cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985). The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system. We see no "unusual circumstances" that warrant addressing Taylor's § 105(a) argument at this time. *Berkemer* v. *McCarty*, 468 U. S. 420, 443, n. 38 (1984).

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, dissenting.

The Court states that it has "no authority to limit the application of § 522*(l)* to exemptions claimed in good faith." *Ante*, at 645. It does not deny, however, that it has ample authority to hold that the doctrine of equitable tolling applies to the 30-day limitations period in Federal Rule of Bankruptcy Procedure 4003(b).[1] In my view, such a result is supported not only by strong equitable considerations, but also by the common law, the widespread practice of the bankruptcy courts, and the text of § 522(b).

I

Rule 4003, which is derived from § 522*(l)* of the Code and in part from former Bankruptcy Rule 403, shifted the em-

[1] Rule 4003(b) provides:

"The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person."

phasis of the earlier Rule, placing the burden on the debtor to list her exemptions and the burden on the parties in interest to raise objections. Rule 4003(b) in particular fills a gap that remains in § 522(*l*), which is silent as to the time in which parties in interest must file their objections. Rule 4003(b) provides for a 30-day period for objections. Although the adoption of Rule 4003 has furthered the interest in orderly administration, there is no suggestion that it was put into effect in order to avoid prejudice to the debtor. Thus, there is no identifiable reason why ordinary tolling principles that apply in other contexts should not also apply in bankruptcy proceedings; indeed, the generally equitable character of bankruptcy makes it especially appropriate to apply such rules in this context.

It is familiar learning that the harsh consequences of federal statutes of limitations have been avoided at times by relying on either fraudulent concealment or undiscovered fraud to toll the period of limitation. For example, in *Bailey* v. *Glover*, 21 Wall. 342, 349–350 (1875), the Court described two situations in which the "strict letter of general statutes of limitation" would not be followed, *id.*, at 347. The first situation is "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts," and the second is "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part." *Id.*, at 347–348. The former involves fraudulent concealment; the latter defines undiscovered fraud. The Court concluded in *Bailey* that fraudulent concealment, which was at issue in that case, tolls the running of the statute of limitations when the fraud "has been concealed, or is of such character as to conceal itself." *Id.*, at 349–350. To hold otherwise, reasoned the Court, would "make the law which was designed to prevent fraud the means by which it is made successful and secure." *Id.*, at 349. In *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1946), the Court extended the reach of this tolling doctrine when

it observed that it is to be "read into every federal statute of limitation."[2]

In this case, even if there was no fraud, and even if it is assumed that the trustee failed to exercise due diligence, it remains true that the parties injured by the trustee's failure to object within the 30-day period are innocent creditors. Moreover, it is apparently undisputed that there was no legitimate basis for the claim of an exemption for the entire award. See *ante*, at 642. Under these circumstances, unless the debtor could establish some prejudice caused by the trustee's failure to object promptly, I would hold that the filing of a frivolous claim for an exemption is tantamount to fraud for purposes of deciding when the 30-day period begins to run.

II

This, in essence, is also the position adopted by numerous Bankruptcy Courts and three Courts of Appeals.[3] Over a period of years, they have held that the failure to make a timely objection is not dispositive, Rule 4003(b) notwithstanding. For example, in *In re Hackett*, 13 B. R. 755, 756 (Bkrtcy. Ct. ED Pa. 1981), the court explained that "[e]quita-

[2] The tolling of a statute of limitations is not limited to cases of fraud. In medical malpractice suits, for example, this Court has long endorsed the view that the statute of limitations will not bar the claim of one who was "blameless[ly] ignoran[t]" of his injury; rather, the statute of limitations will not begin to run until he has knowledge of his injury. *Urie* v. *Thompson*, 337 U. S. 163, 170 (1949).

[3] Some Bankruptcy Courts, however, have read the statute and Rule narrowly and have refused to examine any exemption in the absence of a timely objection. See, *e. g.*, *In re Bradlow*, 119 B. R. 330, 331 (Bkrtcy. Ct. SD Fla. 1990); *In re Duncan*, 107 B. R. 754 (Bkrtcy. Ct. WD Okla. 1988); *In re Payton*, 73 B. R. 31, 32 (Bkrtcy. Ct. WD Tex. 1987); *In re Kretzer*, 48 B. R. 585, 587 (Bkrtcy. Ct. Nev. 1985); *In re Gullickson*, 39 B. R. 922 (Bkrtcy. Ct. WD Wis. 1984). Although the court in *In re Hawn*, 69 B. R. 567 (Bkrtcy. Ct. ED Tenn. 1987), took a similar view, it at least recognized that the result might be different if there had been "evidence that the debtor fraudulently or negligently concealed any facts from the trustee or any creditors." *Id.*, at 568.

ble considerations dictate that a debtor should not be allowed exemptions to which she is obviously not entitled." This view was echoed in *In re Rollins*, 63 B. R. 780, 783–784 (Bkrtcy. Ct. ED Tenn. 1986): "[T]he debtor cannot make property exempt simply by claiming it as exempt when there is no apparent legal basis for the exemption. In that situation, the trustee's failure to object to the claim of exemption within the time limit of Rule 4003(b) does not create an exemption." More recently, the court in *In re Ehr*, 116 B. R. 665, 667 (Bkrtcy. Ct. ED Wis. 1988), reaffirmed this approach, as did the court in *In re Staniforth*, 116 B. R. 127, 130 (Bkrtcy. Ct. WD Wis. 1990). As one court explained: "Read strictly, Rule 4003 and Section 522*(l)* support appellants' position concerning waiver. But, most courts have not followed appellants' interpretation of these provisions. Instead, most courts hold that an exemption must have an apparent legal basis for an exemption to overcome an untimely objection." *In re Stutterheim*, 109 B. R. 1010, 1012 (Kan. 1989).

The equitable principles that motivated these Bankruptcy Courts are best encapsulated by the court in *In re Bennett*, 36 B. R. 893 (Bkrtcy. Ct. WD Ky. 1984). There, the court explained that to apply Rule 4003(b) rigidly would be to encourage a debtor to claim that all of her property was exempt, thus leaving it to the trustee and creditors to sift through the myriad claimed exemptions to assess their validity. Such a policy would result in reversion to "the law of the streets, with bare possession constituting not nine, but ten, parts of the law; orderly administration of estates would be replaced by uncertainty and constant litigation if not outright anarchy." *Id.*, at 895.[4]

---

[4] Bankruptcy courts would understandably be reluctant to encourage a policy that would contribute to the overburdening of the bankruptcy court system. As counsel for the trustee explained: "Last year there were 880,000 bankruptcy filings, 291 bankruptcy judges to deal with all of those filings, and a real need on the part of the bankruptcy courts to rely on the

Although several Courts of Appeals and Bankruptcy Courts did not go as far as these courts, preferring instead in the case of an untimely objection to examine a claimed exemption to determine if there was a "good-faith statutory basis" for the exemption, they nevertheless eschewed the literal reading of the statute and rule adopted by the Court today. They did so because they believed it was important to strike a proper balance between avoiding the undesirable effect of "exemption by declaration" and yet not permitting a trustee "another bite at the debtor's apple where the debtor has claimed certain property exempt in good faith." *In re Peterson*, 920 F. 2d 1389, 1393–1394 (CA8 1990); see *In re Sherk*, 918 F. 2d 1170, 1174 (CA5 1990); *In re Dembs*, 757 F. 2d 777, 780 (CA6 1985).

Here, the trustee would succeed under either approach. Whether the court is always permitted to entertain an objection to a claimed exemption (at least until the case is closed)[5] when the claimed exemption is invalid or whether the court can do so only if the claimed exemption lacks a good-faith statutory basis would mean that in this case the court could review the debtor's claimed exemption. Here, the parties acknowledge that the debtor could not claim a statutory basis for her claimed exemption for the full award because neither backpay nor tort recovery is exempt under § 522(d)(5).

III

The practice of these lower courts has been motivated not only by equitable considerations, but also by the requirement set forth in § 522(b). Section 522*(l)* explicitly provides that "[t]he debtor shall file a list of property that the debtor

---

good faith of debtors in claiming exemptions, otherwise the whole system would collapse." Tr. of Oral Arg. 13. For example, this trustee alone "had approximately two or three hundred of these cases a year, which . . . is typical of bankruptcy trustees all across the country." *Id.*, at 15.

[5]The parties have stipulated that the debtor's case has never been closed. App. 56.

claims as exempt under subsection (b) of this section." Subsection (b) limits exemptions claimed by the debtor to "any property that is exempt under federal law . . . or State or local law that is applicable on the date of the filing of the petition." 11 U. S. C. § 522(b)(2)(A). When a debtor claims exemptions that do not even arguably satisfy this condition,[6] there is good reason to hold that the filing does not comply with § 522 and therefore the 30-day objection period does not begin to run. As one court noted: "If Debtor may select in any manner her exemptions, then no purpose is served by the inclusion of the . . . terms." *In re Kingsbury*, 124 B. R. 146, 148, n. 9 (Bkrtcy. Ct. Me. 1991). It declined to conclude that Congress added the requirements that the property be exempted "under federal law . . . or state law or local law" but "refused to grant them meaning." *Ibid.* (emphasis omitted).

IV

The Court's disposition of this case is straightforward. Because it regards the meaning of the statute and Rule as "plain," that is the end of the case. I have no doubt, however, that if the debtor or the trustee were guilty of fraud, the Court would readily ignore what it now treats as the insurmountable barrier of "plain meaning." The equities in this case are not as strong as if fraud were implicated, but our power to reach a just result despite the "plain meaning" barrier is exactly the same as it was in *Bailey* v. *Glover*, 21

---

[6] The debtor's claimed exemptions in this case not only failed to satisfy any statutory basis, but also failed to provide even the basic information necessary to inform the trustee adequately about the exemption. For example, the debtor indicated on her Schedule B–4 Property Claimed As Exempt form that she was claiming the "[p]roceeds from lawsuit," but that the value was "unknown." App. 14–15. Although the value of the full award ended up amounting to $110,000, and only an amount of approximately $24,000 was required to satisfy the claims of all of her creditors, the debtor never amended her schedule to reflect the precise value of the award.

Wall. 342 (1875). Here, as in *Bailey*, we should be guided by the common-law principles that have supported the tolling of other statutes of limitations, and, in addition, by the experience of bankruptcy courts that have recognized the need for a similar rule to achieve both equitable results and fair administration in cases of this kind. In my view, it is a mistake to adopt a "strict letter" approach, *id.*, at 347, when justice requires a more searching inquiry. Accordingly, I respectfully dissent.

Per Curiam

GOMEZ ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL.

ON APPLICATION TO VACATE STAY

No. A–767. Decided April 21, 1992

The Court of Appeals granted Robert Alton Harris a stay of execution pending a review of his 42 U. S. C. § 1983 claim that his execution by lethal gas would be cruel and unusual in violation of the Eighth Amendment.

Held: The application to vacate the stay of execution is granted. Harris' action is an obvious attempt to avoid the application of *McCleskey* v. *Zant*, 499 U. S. 467, to bar this successive claim for relief. He has made no convincing showing of cause for his failure to raise this claim in his four prior federal habeas petitions. Even assuming that he could avoid the application of *McCleskey*, his claim should not be considered on the merits. Since he is seeking an equitable remedy, the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation must be taken into consideration. This claim could have been raised more than a decade ago, and there is no reason for this abusive delay, which has been compounded by the last-minute attempts to manipulate the judicial process.

Application granted.

PER CURIAM.

Robert Alton Harris brought a 42 U. S. C. § 1983 action claiming that execution by lethal gas is cruel and unusual in violation of the Eighth Amendment. This action is an obvious attempt to avoid the application of *McCleskey* v. *Zant*, 499 U. S. 467 (1991), to bar this successive claim for relief. Harris has now filed four prior federal habeas petitions. He has made no convincing showing of cause for his failure to raise this claim in his prior petitions.

Even if we were to assume, however, that Harris could avoid the application of *McCleskey* to bar his claim, we would not consider it on the merits. Whether his claim is

framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. See *In re Blodgett*, 502 U. S. 236 (1992); *Delo* v. *Stokes*, 495 U. S. 320, 322 (1990) (KENNEDY, J., concurring). This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

The application to vacate the stay of execution of death is granted, and it is ordered that the orders staying the execution of Robert Alton Harris entered by the United States Court of Appeals for the Ninth Circuit in No. 92–70237 on April 20, 1992, are vacated.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In a time when the Court's jurisprudence concerning the imposition of the death penalty grows ever more complicated, Robert Alton Harris brings a simple claim. He argues that California's method of execution—exposure to cyanide gas—constitutes cruel and unusual punishment and therefore violates the Eighth and Fourteenth Amendments. In light of all that we know today about the extreme and unnecessary pain inflicted by execution by cyanide gas, and in light of the availability of more humane and less violent methods of execution, Harris' claim has merit. I would deny the State's application to vacate the stay imposed by the Court of Appeals and allow the courts below to hear and rule on Harris' claim.

Execution by cyanide gas is "in essence asphyxiation by suffocation or strangulation."[1] As dozens of uncontroverted expert statements filed in this case illustrate, execution by cyanide gas is extremely and unnecessarily painful.

> "Following inhalation of cyanide gas, a person will first experience hypoxia, a condition defined as a lack of oxygen in the body. The hypoxic state can continue for several minutes after the cyanide gas is released in the execution chamber. During this time, a person will remain conscious and immediately may suffer extreme pain throughout his arms, shoulders, back, and chest. The sensation may be similar to pain felt by a person during a massive heart attack."[2]

"Execution by gas . . . produces prolonged seizures, incontinence of stool and urine, salivation, vomiting, retching, ballistic writhing, flailing, twitching of extremities, [and] grimacing."[3] This suffering lasts for 8 to 10 minutes, or longer.[4]

Eyewitness descriptions of executions by cyanide gas lend depth to these clinical accounts. On April 6, 1992, Arizona executed Don Eugene Harding.

> "When the fumes enveloped Don's head he took a quick breath. A few seconds later he again looked in my direction. His face was red and contorted as if he were attempting to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then took several more quick gulps of the fumes.

---

[1] Exhibits in Support of Motion for Temporary Restraining Order in No. 92–70237 (ND Cal.) (hereinafter Exhibits), Exh. 1, p. 6 (Declaration of Dr. Terence B. Allen).

[2] *Id.*, Exh. 5, at 4 (Declaration of Richard J. Traystman, Ph. D.).

[3] *Id.*, Exh. 1, at 2.

[4] *Id.*, Exh. 7 (Execution Records, San Quentin Prison).

"At this point Don's body started convulsing violently .... His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode.

"After about a minute Don's face leaned partially forward, but he was still conscious. Every few seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched.

"After several more minutes, the most violent of the convulsions subsided. At this time the muscles along Don's left arm and back began twitching in a wave-like motion under his skin. Spittle drooled from his mouth....

"Don did not stop moving for approximately eight minutes, and after that he continued to twitch and jerk for another minute. Approximately two minutes later, we were told by a prison official that the execution was complete.

"Don Harding took ten minutes and thirty one seconds to die."[5]

The unnecessary cruelty of this method of execution convinced Arizona's Attorney General that that State should abandon execution by gas in favor of execution by lethal injection.[6] His conclusion coincides with that of numerous medical, legal, and ethical experts.[7]

The prohibition on cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public

---

[5] 2 *id.*, Exh. 17, at 3–4 (Affidavit of James J. Belanger).

[6] Memorandum in Support of Emergency Application for Temporary Restraining Order in No. 92–70237 (ND Cal.), p. 8. A bill to substitute lethal injection for lethal gas as Arizona's method of execution is currently pending before that State's legislature. See 4 Exhibits, Exh. 62 (H. B. 2055).

[7] See, *e. g.*, 1 *id.*, Exh. 1, at 3; *id.*, Exh. 2, at 3 (Declaration of Robert H. Kirschner, M. D.); *id.*, Exh. 4, at 3 (Declaration of Kent R. Olson, M. D.).

opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U. S. 349, 378 (1910). Accordingly, we have "interpreted the [Eighth] Amendment 'in a flexible and dynamic manner.'" *Stanford* v. *Kentucky*, 492 U. S. 361, 369 (1989) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 171 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.)). When the California statute requiring execution by cyanide gas was enacted in 1937, the gas chamber was considered a humane method of execution. Fifty-five years of history and moral development have superseded that judgment. The barbaric use of cyanide gas in the Holocaust, the development of cyanide agents as chemical weapons, our contemporary understanding of execution by lethal gas, and the development of less cruel methods of execution all demonstrate that execution by cyanide gas is unnecessarily cruel. "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463 (1947) (opinion of Reed, J.).

Nowhere is this moral progress better demonstrated than in the decisions of the state legislatures. Of the 20 or so States to adopt new methods of execution since our ruling in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), not a single State has chosen execution by lethal gas. Ten years ago, 10 States mandated execution by lethal gas; one by one, those States have abandoned that method as inhumane and torturous. Only California, Maryland, and Arizona currently mandate execution by gas.[8] Of the 168 persons executed in the United States since 1977, only 6 have been executed by lethal gas. We have frequently emphasized that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989). These "objec-

[8] As noted above, Arizona is considering abandoning lethal gas as a means of execution. See n. 6, *supra*. Maryland has not yet resumed executions.

tive indicia that reflect the public attitude" toward execution by lethal gas, *Stanford* v. *Kentucky*, 492 U. S., at 370, clearly exhibit a nearly universal rejection of that means of execution.[9] Cf. *Enmund* v. *Florida*, 458 U. S. 782, 788–796 (1982); *Coker* v. *Georgia*, 433 U. S. 584, 593–597 (1977). All of this leads me to conclude that execution by cyanide gas is both cruel and unusual, and that it violates contemporary standards of human decency.[10]

More than a century ago, we declared that "[p]unishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U. S. 436, 447 (1890). In light of our contemporary understanding of the methods of execution and in light of less cruel alternatives presently available, I believe that execution by cyanide gas is "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)).

The State contends that Harris should have brought his claim earlier. This is not reason enough to upset the stay issued by the Court of Appeals and dispatch the considered judgment of the 14 appellate judges who voted to rehear the case en banc. Indeed, although reluctant to recognize

---

[9] Notably, a memorandum prepared by California corrections officials correctly observes that "[l]ethal injection is considered to be more humane than other methods of execution (e. g., hanging, firing squad, lethal gas, or electrocution)." 1 Exhibits, Exh. 11, at 4.

[10] In *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1879), we ruled that punishments of "unnecessary cruelty" violated the Eighth Amendment, citing the ancient practices of drawing and quartering and "public dissection" as examples. Similarly in *In re Kemmler*, 136 U. S. 436, 446 (1890), we indicated that "burning at the stake, crucifixion, [and] breaking on the wheel" were as well cruel and unusual. To that list we might have added the garrotte, a device for execution by strangulation developed—and abandoned—centuries ago in Spain. See G. Scott, The History of Capital Punishment 159–160 (1950). To my mind, the gas chamber is nothing more than a chemical garrotte.

as much, the State itself could have avoided this last-minute litigation. In 1983, seven States authorized executions by exposure to cyanide gas. In that year, three Members of this Court indicated that that method of execution raised sufficiently serious questions under the Eighth Amendment to merit review by writ of certiorari. See *Gray* v. *Lucas*, 463 U. S. 1237 (1983). Thereafter, four States (Colorado, Mississippi, Oregon, and Wyoming) abandoned cyanide gas as a method of execution. In light of these events and the decisions of other legislatures, California as well should have revisited its 55-year-old statute.

More fundamentally, if execution by cyanide gas is in fact unconstitutional, then the State lacks the *power* to impose such punishment. Harris' delay, even if unjustified, cannot endow the State with the authority to violate the Constitution. It was this principle that animated Justice Harlan's opinion in *Mackey* v. *United States*, 401 U. S. 667, 692–693 (1971), and that a plurality of this Court embraced in *Teague* v. *Lane*, 489 U. S. 288, 306–307 (1989) (opinion of O'CONNOR, J.). As Harlan emphasized, there are some instances in which the State's interest in finality must give way. When the challenged conduct falls clearly beyond the State's legitimate power, "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." 401 U. S., at 693. For these reasons, the State's interest in an immediate execution must yield to a deliberate and careful study of the merits of Harris' claims.

Accordingly, I respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 659 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR FEBRUARY 28 THROUGH MAY 1, 1992

FEBRUARY 28, 1992

Dismissals Under Rule 46

No. 91–1271. BURLINGTON COUNTY BRIDGE COMMISSION *v.* LACONIS. Super. Ct. Pa. Certiorari dismissed under this Court's Rule 46. Reported below: 400 Pa. Super. 483, 583 A. 2d 1218.

No. 91–1083. DOHERTY *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 943 F. 2d 204.

Certiorari Denied

No. 91–7437 (A–635). CLARK *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 956 F. 2d 68.

MARCH 2, 1992

Vacated and Remanded on Appeal

No. 91–6255. SIGGERS ET AL. *v.* TUNICA COUNTY BOARD OF SUPERVISORS ET AL. Appeal from D. C. N. D. Miss. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded with instructions to dismiss the appeal as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

Certiorari Granted—Vacated and Remanded

No. 91–1116. HICKS *v.* BROWN GROUP, INC., DBA BROWN SHOE CO., INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Civil Rights Act of 1991. Reported below: 946 F. 2d 1344.

No. 91–6586. DEAN *v.* VETERANS ADMINISTRATION. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider whether Rule 15(c) of the Federal Rules of Civil Procedure, as amended, applies to this case. Reported below: 943 F. 2d 667.

Miscellaneous Orders

No. D–1043. IN RE DISBARMENT OF FRAZER. Disbarment entered. [For earlier order herein, see 502 U. S. 935.]

No. D–1056. IN RE DISBARMENT OF TAUB. Disbarment entered. [For earlier order herein, see 502 U. S. 978.]

No. D–1057. IN RE DISBARMENT OF BERMAN. Disbarment entered. [For earlier order herein, see 502 U. S. 978.]

No. D–1058. IN RE DISBARMENT OF BONNER. Disbarment entered. [For earlier order herein, see 502 U. S. 979.]

No. D–1059. IN RE DISBARMENT OF MARQUARDT. Disbarment entered. [For earlier order herein, see 502 U. S. 1010.]

No. D–1085. IN RE DISBARMENT OF KENNEY. It is ordered that Donald J. Kenney, of Safford, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1086. IN RE DISBARMENT OF NUZZO. It is ordered that Ralph A. Nuzzo, of Fairfield, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1087. IN RE DISBARMENT OF FOX. It is ordered that H. Lawrence Fox, of Alexandria, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1088. IN RE DISBARMENT OF KRAMER. It is ordered that Arnold I. Kramer, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1089. IN RE DISBARMENT OF WELLMAN. It is ordered that Bruce D. Wellman, of Dixon, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1090. IN RE DISBARMENT OF GARNER. It is ordered that Gerald J. Garner, of Harrison, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 91–17. ESTATE OF COWART *v.* NICKLOS DRILLING CO. ET AL. C. A. 5th Cir. [Certiorari granted, 502 U. S. 1003.] Motion of the Solicitor General for divided argument granted.

No. 91–155. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. *v.* LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE; and

No. 91–339. LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 502 U. S. 1022.] Motions of Multimedia Newspaper Co. et al. and American Federation of Labor and Congress of Industrial Organizations for leave to file briefs as *amici curiae* granted.

No. 91–543. NEW YORK *v.* UNITED STATES ET AL.;

No. 91–558. COUNTY OF ALLEGANY, NEW YORK *v.* UNITED STATES ET AL.; and

No. 91–563. COUNTY OF CORTLAND, NEW YORK *v.* UNITED STATES ET AL. C. A. 2d Cir. [Certiorari granted, 502 U. S. 1023.] Motion of Council of State Governments for leave to file a brief as *amicus curiae* granted.

No. 91–872. UNITED STATES *v.* SALERNO ET AL. C. A. 2d Cir. [Certiorari granted, 502 U. S. 1056.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 91–1108. DEKALB BOARD OF REALTORS, INC., ET AL. *v.* THOMPSON, DBA FLETCHER L. THOMPSON REALTY, ET AL. C. A. 11th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 91-6392. HEAD *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied pursuant to this Court's Rule 39.8. Petitioner is allowed until March 23, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Earlier this Term, the Court applied its new Rule 39.8[1] for the first time, denying *in forma pauperis* status to two indigent litigants—Vladimir Zatko and James Martin. *Zatko* v. *California*, 502 U. S. 16 (1991) *(per curiam)*. In explaining its action, the Court emphasized that Zatko and Martin were "unique." *Id.*, at 18. What distinguished these petitioners, the Court explained, was not the frivolousness, but the frequency of their filings. Indeed, the Court found it "important to observe" that it had not applied Rule 39.8 to numerous other frivolous petitions. *Ibid.* The Court noted that these other petitions were denied "in the usual manner, underscoring our commitment to hearing the claims, however meritless, of the poor." *Ibid.*

Zatko had filed 73 petitions in this Court over the past 10 years; Martin had filed more than 45. *Id.*, at 17. In invoking Rule 39.8 today, the Court denies leave to proceed *in forma pauperis* to petitioner Joseph Head. Head has previously filed *one* petition in this Court.[2]

Today's action thus represents an unexplained expansion of Rule 39.8 and an apparent rejection of the explanation for the action taken with respect to petitioners Zatko and Martin. I would grant leave to proceed *in forma pauperis*, deny the petition for writ of certiorari, and get on with the business of the Court.

No. 91-6781. KATTULA *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* de-

---

[1] This Court's Rule 39.8 provides:

"If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis*."

[2] See *Head* v. *Pinion*, 500 U. S. 956 (1991).

nied. Petitioner is allowed until March 23, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 91–7005. IN RE GILES; and

No. 91–7203. IN RE KALTENBACH. Petitions for writs of habeas corpus denied.

No. 91–6926. IN RE MARIN; and

No. 91–6964. IN RE ZOLICOFFER. Petitions for writs of mandamus denied.

Certiorari Granted

No. 91–687. MONTANA *v.* IMLAY. Sup. Ct. Mont. Certiorari granted. Reported below: 249 Mont. 82, 813 P. 2d 979.

No. 91–719. PARKE, WARDEN *v.* RALEY. C. A. 6th Cir. Certiorari granted. Reported below: 945 F. 2d 137.

No. 91–781. UNITED STATES *v.* A PARCEL OF LAND, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 937 F. 2d 98.

No. 91–905. BARR, ATTORNEY GENERAL, ET AL. *v.* FLORES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 942 F. 2d 1352.

No. 91–946. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted.

No. 91–1188. ROWLAND, FORMER DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNCIL. C. A. 9th Cir. Certiorari granted. Reported below: 939 F. 2d 854.

No. 91–6194. CROSBY *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 951 F. 2d 357.

No. 91–6646. HADLEY *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 918 F. 2d 848.

Certiorari Denied

No. 91–560. COOK ET AL. *v.* ALEXANDER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 927 F. 2d 1014.

No. 91–676. GUMBY ET AL. *v.* GENERAL PUBLIC UTILITIES CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 940 F. 2d 832.

No. 91–691. THULEN *v.* BAUSMAN, SHERIFF, CARROLL COUNTY, ILLINOIS; and

No. 91–1045. UPTON *v.* THOMPSON, SHERIFF OF KANKAKEE COUNTY. C. A. 7th Cir. Certiorari denied. Reported below: 930 F. 2d 1209.

No. 91–761. PENN CENTRAL CORP. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 944 F. 2d 164.

No. 91–843. LITTLE FOREST MEDICAL CENTER OF AKRON *v.* OHIO CIVIL RIGHTS COMMISSION. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 3d 607, 575 N. E. 2d 1164.

No. 91–915. ISCA ENTERPRISES ET AL. *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 77 N. Y. 2d 688, 572 N. E. 2d 610.

No. 91–918. KALAN INC. *v.* UNITED STATES; and HOSPITAL CORPORATION OF AMERICA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 944 F. 2d 847 (first case); 945 F. 2d 417 (second case).

No. 91–986. SHERMAN *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1319.

No. 91–1019. CLEMONS ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 6th Cir. Certiorari denied. Reported below: 941 F. 2d 1209.

No. 91–1052. GOODWIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 937 F. 2d 98.

No. 91–1081. WIRSING *v.* BOARD OF REGENTS OF UNIVERSITY OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 945 F. 2d 412.

No. 91–1082. FOSTER *v.* RUTGERS, THE STATE UNIVERSITY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1476.

No. 91–1100. FUNNELL *v.* MARTIN. Ct. App. Okla. Certiorari denied.

No. 91–1102. CHEZ SEZ III CORP. ET AL. *v.* TOWNSHIP OF UNION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 2d 628.

No. 91–1103. CENTRAL GMC, INC. *v.* GENERAL MOTORS CORP. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 327.

No. 91–1110. HARWOOD *v.* PARTREDEREIT AF. 15.5.81. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 2d 1187.

No. 91–1119. MCGILL *v.* DUCKWORTH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 944 F. 2d 344.

No. 91–1121. WILLOUGHBY *v.* WILLOUGHBY. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 587 So. 2d 1342.

No. 91–1126. KUTSKO *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (KUTSKO, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–1127. ACCARDO ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 942 F. 2d 444.

No. 91–1129. BECK *v.* BECK. Sup. Ct. Tex. Certiorari denied. Reported below: 814 S. W. 2d 745.

No. 91–1137. LIN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 933 F. 2d 1014.

No. 91–1144. STARR *v.* CITY OF ALTOONA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 941 F. 2d 1203.

No. 91–1149. NOBLE *v.* NATIONAL MINES CORP. C. A. 6th Cir. Certiorari denied. Reported below: 941 F. 2d 1210.

No. 91–1156. LOCRICCHIO ET AL. *v.* EVENING NEWS ASSN., INC., ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 438 Mich. 84, 476 N. W. 2d 112.

No. 91–1189. EVANS, INDIVIDUALLY AND AS GUARDIAN OF EVANS, WARD AND SPOUSE *v.* NORTHWEST AIRLINES, INC., ET AL. Ct. App. Minn. Certiorari denied.

No. 91–1223. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 896.

No. 91–1257. GUTHRIE, NOW DECEASED, BY AND THROUGH GUTHRIE *v.* TIFCO INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 2d 374.

No. 91–5965. PIZZUTO *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 119 Idaho 742, 810 P. 2d 680.

No. 91–6157. JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 937 F. 2d 619.

No. 91–6189. HENDERSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 583 So. 2d 305.

No. 91–6262. ARKY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 938 F. 2d 579.

No. 91–6290. WOOD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 978.

No. 91–6365. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 936 F. 2d 352.

No. 91–6378. RIGSBY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 631.

No. 91–6476. WARNER ET AL. *v.* ELLERBE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 937 F. 2d 600.

No. 91–6571. RAMOS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 933 F. 2d 968.

No. 91–6690. DUNCAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 53 Cal. 3d 955, 810 P. 2d 131.

No. 91–6771. STOWELL, AKA TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1251.

No. 91–6788. PEDROZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 942 F. 2d 796.

No. 91–6828. NETELKOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 938.

No. 91–6878. SHELTON *v.* DAVIS ET AL.; and

No. 91–6879. SHELTON *v.* MATTINA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1277.

No. 91–6881. CARTER *v.* BARR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1294.

No. 91–6912. FUNK *v.* LOYALTY ENTERPRISES, LTD. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 279.

No. 91–6913. TAYLOR *v.* SCHWEITZER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 951 F. 2d 357.

No. 91–6930. TODARO *v.* FULCOMER, DEPUTY COMMISSIONER, WESTERN REGION, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 944 F. 2d 1079.

No. 91–6931. BROWN *v.* WILLIAM, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 2d 900.

No. 91–6937. SPRINGER *v.* ROTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 91–6944. NABKEY *v.* PECKERAL ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–6945. BAHR *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 950 F. 2d 731.

No. 91–6947. FERRIS *v.* KASS, JUDGE, SECOND JUDICIAL COURT. C. A. 10th Cir. Certiorari denied. Reported below: 940 F. 2d 1538.

No. 91–6948. DEAN *v.* SMITH ET AL. C. A. 11th Cir. Certiorari denied.

No. 91–6949. DEAN *v.* HOMEOWNER'S REPAIR SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 91–6950. USHER *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 943 F. 2d 889.

No. 91–6951. SCHLUP *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 941 F. 2d 631.

No. 91-6955. GAUNCE *v.* BURGENER ET AL. C. A. 9th Cir. Certiorari denied.

No. 91-6960. FLORIAN *v.* LEFEVRE, SUPERINTENDENT, FRANKLIN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1277.

No. 91-6971. SHABAZZ *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 306 Ark. xxi.

No. 91-6975. DAVIS *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91-6976. WIDENHOUSE *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 582 So. 2d 1374.

No. 91-6980. SHAW *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 91-6981. WESLEY *v.* REDMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 947.

No. 91-6982. WHITE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 939 F. 2d 912.

No. 91-6983. MESSER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 249 Kan. ix, 815 P. 2d 119.

No. 91-6984. VORHAUER *v.* NIX ET AL. C. A. 3d Cir. Certiorari denied.

No. 91-6985. BROOKS ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 91-6987. ALLEYN *v.* WARDEN, SMITHFIELD STATE PRISON. Sup. Ct. Pa. Certiorari denied.

No. 91-6990. HARRIS *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 1497.

No. 91-6994. MITCHELL *v.* RENFRO ET AL. C. A. 6th Cir. Certiorari denied.

No. 91-6998. PARISEAU *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 52.

No. 91–7020. LAWSON *v.* LEWIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 936 F. 2d 586.

No. 91–7022. MURRAY *v.* DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Sup. Ct. Fla. Certiorari denied. Reported below: 593 So. 2d 1052.

No. 91–7024. RUB ET AL. *v.* ADOLPH RUB TRUST ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 474 N. W. 2d 73.

No. 91–7044. WATTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 508.

No. 91–7055. DIAZ-REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 669.

No. 91–7057. HUNTER *v.* LINDLER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 2d 901.

No. 91–7082. DINGESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397.

No. 91–7090. SCHMALZRIED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1487.

No. 91–7091. PETERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 952 F. 2d 960.

No. 91–7093. MCCAFFERTY *v.* LEAPLEY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 944 F. 2d 445.

No. 91–7099. MOORE *v.* BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 944 F. 2d 911.

No. 91–7100. OWENS *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 945.

No. 91–7110. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 896.

No. 91–7114. FARRIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 819 S. W. 2d 490.

No. 91–7125. SWINICK *v.* DIAMOND ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 91–7126. MILLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 631.

No. 91–7137. PARKER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 591 So. 2d 640.

No. 91–7144. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 936 F. 2d 1243.

No. 91–7148. DANIELS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1033.

No. 91–7155. PRIVETTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1259.

No. 91–7161. SINGLETARY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1283.

No. 91–7167. ADEDEJI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1277.

No. 91–7194. ECHOLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 352.

No. 91–7195. PEA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 946.

No. 91–7196. OCAMPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 939 F. 2d 1455.

No. 91–7222. RAMIREZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 141 Ill. 2d 555, 580 N. E. 2d 129.

No. 91–785. CHRISTOPHERSEN, SURVIVING SPOUSE OF CHRISTOPHERSEN, DECEASED, ET AL. *v.* ALLIED-SIGNAL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 939 F. 2d 1106.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

This case concerns the appropriate standard for determining the admissibility of expert testimony. It is an issue that has long divided the federal courts, see *Mustafa* v. *United States*, 479 U. S. 953 (1986) (WHITE, J., joined by Brennan, J., dissenting from denial of certiorari), and here deeply divided the Court of Appeals for the Fifth Circuit, sitting en banc.

Albert Roy Christophersen died of a rare form of cancer in 1986. Petitioners, his widow and son, brought suit, claiming that Christophersen's illness was caused by fumes from the manufacture of nickel/cadmium batteries in the factory where he had worked for 14 years. Petitioners based this claim upon the expert opinion of an internist and toxicologist. Respondents contended that there was no reliable basis for the expert's views and moved for summary judgment. The United States District Court for the Western District of Texas agreed that the doctor's affidavit was "not based upon the type of evidence usually relied upon by experts in the field of cancer research" and entered judgment for respondents. App. C to Pet. for Cert. 74–75.

A panel of the Court of Appeals reversed, 902 F. 2d 362 (1990), but on rehearing en banc, eight members of the court voted to affirm the judgment of the District Court, based in part on their conclusion that the admissibility of an expert witness' evidence should turn on whether his or her methodology is generally accepted within the scientific community. 939 F. 2d 1106 (1991) *(per curiam)*. This standard, known as the *Frye* test, was announced almost 70 years ago. See *Frye* v. *United States*, 54 App. D. C. 46, 293 F. 1013 (1923). But five members of the Court of Appeals concluded that the *Frye* test was not the applicable evidentiary standard. 939 F. 2d, at 1116 (Clark, C. J., concurring in result); *id.*, at 1122, 1136 (Reavley, King, Johnson, Wiener, JJ., dissenting in two opinions).

As the Fifth Circuit is divided, so the Courts of Appeals are in disagreement. Some continue to apply the approach set forth in *Frye* in deciding whether expert evidence is admissible. *E. g.*, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 951 F. 2d 1128 (CA9 1991); *United States* v. *Two Bulls*, 918 F. 2d 56 (CA8 1990); *United States* v. *Smith*, 869 F. 2d 348 (CA7 1989). But courts in other Circuits have concluded that *Frye* was superseded in 1975 by the Federal Rules of Evidence, which they maintain established a lower threshold for determining the admissibility of expert evidence. *E. g.*, *United States* v. *Jakobetz*, 955 F. 2d 786 (CA2 1992); *DeLuca* v. *Merrell Dow Pharmaceuticals, Inc.*, 911 F. 2d 941 (CA3 1990). Because this is an important and recurring issue, I would grant certiorari to resolve the conflict.

No. 91–883. CHILDREN'S LEGAL FOUNDATION, INC., ET AL. *v.* ACTION FOR CHILDREN'S TELEVISION ET AL.; and

No. 91–952. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* ACTION FOR CHILDREN'S TELEVISION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. JUSTICE THOMAS took no part in the consideration or decision of these petitions. Reported below: 290 U. S. App. D. C. 4, 932 F. 2d 1504.

No. 91–966. MICHIGAN *v.* MASON. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 91–1148. SOUTH CAROLINA *v.* MANNING. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 305 S. C. 413, 409 S. E. 2d 372.

No. 91–995. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* IVY CLUB. C. A. 3d Cir. Motion of Tiger Inn for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 943 F. 2d 270.

No. 91–1072. UTAH *v.* SAMPSON. Ct. App. Utah. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 808 P. 2d 1100.

No. 91–1109. CAMOSCIO *v.* ROUSE, JUDGE. Sup. Jud. Ct. Mass. Motion of petitioner for an order to direct respondent to correct the court docket denied. Certiorari denied.

No. 91–1117. SOUTHWESTERN BELL TELEPHONE CO. *v.* LANGSTON ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 945 F. 2d 416.

No. 91–1166. PHONETELE, INC. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 889 F. 2d 224.

Rehearing Denied

No. 91–789. GRUNST *v.* UNITED STATES ET AL., 502 U. S. 1034;
No. 91–6312. DAMIAN *v.* FEDERAL EXPRESS CORP., 502 U. S. 1050;

No. 91-6390. KENT *v.* DEPARTMENT OF LABOR, 502 U. S. 1042;
No. 91-6438. NEWCOMB *v.* INGLE ET AL., 502 U. S. 1044; and
No. 91-6472. JOHNSON *v.* UNITED STATES, 502 U. S. 1063. Petitions for rehearing denied.

MARCH 3, 1992

Certiorari Denied

No. 91-7476 (A-651). ELLIS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE SOUTER would grant the application for stay of execution.

No. 91-7477 (A-652). ELLIS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE SOUTER would grant the application for stay of execution. Reported below: 956 F. 2d 76.

MARCH 6, 1992

Dismissal Under Rule 46

No. 91-891. EICHLEAY CORP. *v.* INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 944 F. 2d 1047.

Certiorari Denied

No. 91-7240 (A-641). ROBISON *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 818 P. 2d 1250.

MARCH 9, 1992

Dismissals Under Rule 46

No. 91-1182. CITY OF EMPORIA, KANSAS *v.* RENFRO ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 948 F. 2d 1529.

No. 88–790. TURNOCK, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, ET AL. *v.* RAGSDALE ET AL. C. A. 7th Cir. [Probable jurisdiction postponed, 492 U. S. 916.] Appeal dismissed under this Court's Rule 46.

Certiorari Granted—Vacated and Remanded

No. 90–7699. MINNIEFIELD *v.* PERKINS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hudson* v. *McMillian*, *ante*, p. 1. Reported below: 917 F. 2d 561.

Miscellaneous Orders

No. ———. VAN WOUNDENBERG *v.* OKLAHOMA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. D–1060. IN RE DISBARMENT OF BLUMENFELD. Disbarment entered. [For earlier order herein, see 502 U. S. 1010.]

No. D–1061. IN RE DISBARMENT OF WALDRON. Disbarment entered. [For earlier order herein, see 502 U. S. 1010.]

No. D–1064. IN RE DISBARMENT OF SOLOMON. Disbarment entered. [For earlier order herein, see 502 U. S. 1011.]

No. D–1067. IN RE DISBARMENT OF CARDIN. Disbarment entered. [For earlier order herein, see 502 U. S. 1026.]

No. D–1091. IN RE DISBARMENT OF CRABTREE. It is ordered that Granville H. Crabtree, Jr., of Sarasota, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1092. IN RE DISBARMENT OF DEVINE. It is ordered that Stephen John Devine, of Norristown, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1093. IN RE DISBARMENT OF ROBBINS. It is ordered that Alan E. Robbins, of Van Nuys, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motions of National Audubon Society and Platte River Whooping Crane Critical Habitat Maintenance Trust for leave to file briefs as *amici curiae* granted. [For earlier order herein, see, *e. g.*, 502 U. S. 1055.]

No. 90–747. UNITED STATES DEPARTMENT OF STATE *v.* RAY ET AL., 502 U. S. 164. Motion of respondents to retax costs denied. JUSTICE BLACKMUN would grant this motion.

No. 90–1676. GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL SOLID WASTES MANAGEMENT ASSN. C. A. 7th Cir. [Certiorari granted, 502 U. S. 1012.] Motion of the Solicitor General to permit William K. Kelly, Esq., to present oral argument *pro hac vice* granted.

No. 91–17. ESTATE OF COWART *v.* NICKLOS DRILLING CO. ET AL. C. A. 5th Cir. [Certiorari granted, 502 U. S. 1003.] Motions of Petroleum Helicopters, Inc., et al. and National Association of Stevedores et al. for leave to file briefs as *amici curiae* granted.

No. 91–542. WRIGHT, WARDEN, ET AL. *v.* WEST. C. A. 4th Cir. [Certiorari granted, 502 U. S. 1012.] Motion of the Attorney General of North Dakota to withdraw as *amicus curiae* granted.

No. 91–543. NEW YORK *v.* UNITED STATES ET AL.;

No. 91–558. COUNTY OF ALLEGANY, NEW YORK *v.* UNITED STATES ET AL.; and

No. 91–563. COUNTY OF CORTLAND, NEW YORK *v.* UNITED STATES ET AL. C. A. 2d Cir. [Certiorari granted, 502 U. S. 1023.] Motion of respondents Washington et al. for divided argument granted.

No. 91–763. REPUBLIC OF ARGENTINA ET AL. *v.* WELTOVER, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 502 U. S. 1024.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–786. CLARKE *v.* LOMA LINDA FOODS, INC., ET AL., 502 U. S. 1034. Respondents are invited to file a response to the petition for rehearing within 30 days.

No. 91–894. MAXIE ET AL. *v.* FELIX, 502 U. S. 1093. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 91–1195. BEIJING EVER BRIGHT INDUSTRIAL CO. *v.* TIMBER FALLING CONSULTANTS, INC. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 91–1370. KING *v.* PALMER, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. D. C. Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this motion.

No. 91–6821. IN RE ANDERSON. Petition for writ of mandamus denied.

Certiorari Granted

No. 91–1010. PUERTO RICO AQUEDUCT AND SEWER AUTHORITY *v.* METCALF & EDDY, INC. C. A. 1st Cir. Certiorari granted. Reported below: 945 F. 2d 10.

No. 91–1200. CITY OF CINCINNATI *v.* DISCOVERY NETWORK, INC., ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 946 F. 2d 464.

No. 91–6516. SOLDAL ET UX. *v.* COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 942 F. 2d 1073.

Certiorari Denied

No. 90–1208. PEARSON ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 1215.

No. 90–8325. JOUBERT *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 237 Neb. xxxi.

No. 91–873. RYAN ET AL. *v.* CITY OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 206 Ill. App. 3d 968, 565 N. E. 2d 68.

No. 91–914. YOUNG *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 88, 946 F. 2d 1568.

No. 91–947. FINKELMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 937 F. 2d 612.

No. 91–967. TEICH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1277.

No. 91–997. OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF WHITE FARM EQUIPMENT CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 2d 752.

No. 91–1001. NYE COUNTY, NEVADA, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 938 F. 2d 1040.

No. 91–1074. MEYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1317.

No. 91–1113. LEGISLATURE OF THE STATE OF CALIFORNIA ET AL. *v.* EU ET AL.; and

No. 91–1114. CALIFORNIANS FOR A CITIZEN GOVERNMENT *v.* LEGISLATURE OF THE STATE OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 3d 492, 816 P. 2d 1309.

No. 91–1130. ILLINOIS *v.* KRUEGER. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 208 Ill. App. 3d 897, 567 N. E. 2d 717.

No. 91–1143. OWENS-CORNING FIBERGLAS CORP. ET AL. *v.* WEBB ET AL. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 809 S. W. 2d 899.

No. 91–1147. GNATOVICH *v.* OHIO. Ct. App. Ohio, Medina County. Certiorari denied.

No. 91–1150. JAMA CONSTRUCTION CORP., INC. *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 938 F. 2d 1045.

No. 91–1154. STANDARD FRUIT CO. ET AL. *v.* REPUBLIC OF NICARAGUA. C. A. 9th Cir. Certiorari denied. Reported below: 937 F. 2d 469.

No. 91–1165. ILLINOIS *v.* CASAZZA ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 144 Ill. 2d 414, 581 N. E. 2d 651.

No. 91–1167. SKY CHEFS, INC. *v.* DIAS. C. A. 9th Cir. Certiorari denied. Reported below: 948 F. 2d 532.

No. 91–1168. INTERNATIONAL EATERIES OF AMERICA, INC. *v.* BROWARD COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 941 F. 2d 1157.

No. 91–1174. MEYERS *v.* KALLESTEAD, DBA BETTE MOM'S TAVERN. Sup. Ct. Iowa. Certiorari denied. Reported below: 476 N. W. 2d 65.

No. 91–1181. COLEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–1187. HOOPER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 585 So. 2d 142.

No. 91–1190. ARIZONA *v.* QUINTON. Ct. App. Ariz. Certiorari denied. Reported below: 168 Ariz. 545, 815 P. 2d 914.

No. 91–1192. LAKE AT LAS VEGAS INVESTORS GROUP, INC. *v.* TRANSCONTINENTAL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 933 F. 2d 724.

No. 91–1215. BLAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BLAS *v.* GOVERNMENT OF GUAM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 941 F. 2d 778.

No. 91–1245. DENNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 2d 295.

No. 91–1298. NOWICKI *v.* WISCONSIN SUPREME COURT, JUDICIAL ADMINISTRATIVE DISTRICTS 1, 2, AND 3, ET AL. Sup. Ct. Wis. Certiorari denied.

No. 91–6239. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 940 F. 2d 656.

No. 91–6296. JACOBS *v.* SUPREME COURT OF MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 91–6542. COLETTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 285.

No. 91–6638. LEWIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 815 S. W. 2d 560.

No. 91–6668. LEWIS *v.* RUSSE ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–6672. FOSTER *v.* GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 450, 406 S. E. 2d 74.

No. 91–6703. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 937.

No. 91–6724. MEDINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 903.

No. 91–6750. MANFRED *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 950 F. 2d 731.

No. 91–6763. BOYLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 820 S. W. 2d 122.

No. 91–6784. TORO ARISTIZABAL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 940 F. 2d 722.

No. 91–6816. BONHAM *v.* BOBO ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 83, 946 F. 2d 1563.

No. 91–6823. WENINGER *v.* BROOKS. C. A. 10th Cir. Certiorari denied.

No. 91–6872. DEMAREST *v.* MANSPEAKER, CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 655.

No. 91–6890. COX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 942 F. 2d 1282.

No. 91–6952. KENNEDY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 578 N. E. 2d 633.

No. 91–6993. MAURER *v.* LOS ANGELES COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 930 F. 2d 28.

No. 91–7000. SUN *v.* FORRESTER. C. A. 11th Cir. Certiorari denied. Reported below: 939 F. 2d 924.

No. 91–7003. DIXON *v.* DEPARTMENT OF SERVICES FOR CHILDREN ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 586 A. 2d 1201.

No. 91–7009. CAIN *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 817.

No. 91–7011. STEELE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 91–7026. COVILLION *v.* AETNA LIFE & CASUALTY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 946 F. 2d 881.

No. 91–7029. BUTLER *v.* BURTON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 91–7032. JACKSON *v.* DOW CHEMICAL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 717.

No. 91–7033. FRESQUEZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–7035. KEYES *v.* HUCKLEBERRY HOUSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 936 F. 2d 578.

No. 91–7042. ROBINSON *v.* PONTE, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 933 F. 2d 101.

No. 91–7043. ORTIS ET AL. *v.* DELMAR OFFSHORE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 2d 401.

No. 91–7046. MCKINNEY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1296.

No. 91–7068. ELDER *v.* HAHN, SUPERINTENDENT, TENNESSEE FEDERAL PRISON CAMP. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1288.

No. 91–7095. PRATHER *v.* THOMAS ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. XXX, 411 S. E. 2d 42.

No. 91–7096. PHELPS *v.* ANGELONE, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7112. NABRASKI *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Sup. Ct. Cal. Certiorari denied.

No. 91–7180. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1291.

No. 91–7192. WALSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 2d 664.

No. 91–7199. ANDERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 937.

No. 91–7202. GALE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 218, 952 F. 2d 1412.

No. 91–7205. GALLARDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 346.

No. 91–7208. ALLRED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 919 F. 2d 734.

No. 91–7209. BOCK, AKA CULLOM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410.

No. 91–7217. COOPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 942 F. 2d 1200.

No. 91–7227. MITCHELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 595 A. 2d 1010.

No. 91–7253. CLAY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 818 S. W. 2d 264.

No. 91–774. HIERSCHE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HIERSCHE, DECEASED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 933 F. 2d 1014.

Opinion of JUSTICE STEVENS, respecting the denial of the petition for writ of certiorari.

Petitioner asks us to resolve a recurring conflict among the Courts of Appeals concerning the meaning of a once obscure sentence in § 3 of the Mississippi River Flood Control Act of 1928.[1]

[1] Section 3 of the statute, which is now codified as 33 U. S. C. § 702c, reads in full as follows:

"SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory

During the past decade that sentence has assumed greater and greater importance because it has provided the Government with a defense to claims for personal injury and death caused by federal negligence, gross negligence, and even "conscious governmental indifference to the safety of the public." *United States* v. *James*, 478 U. S. 597, 600 (1986) (citation and internal quotation marks omitted).[2]

This is the latest in an expanding series of tragic cases. Jerome Hiersche, a professional diver, contracted with the Government to inspect submerged fish screens at the hydroelectric intake on the John Day Dam on the Columbia River between Oregon and Washington. Although Government employees assured him that the water flow to the fish bypass system would be shut off, they negligently failed to do so. Petitioner's head was drawn into an orifice in the fish bypass system, and he suffered fatal injuries. The Government defended this wrongful-death action

---

to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

"*No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place*: *Provided, however*, That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands." 45 Stat. 535–536 (emphasis added).

[2] As one court noted, while Congress often enacts special legislation to aid the victims of floods, thus mitigating the harsh effect of § 702c with respect to property damage, Congress does not pass special legislation to assist individuals who suffer personal injury in flood-control waters as a result of Government negligence. See *Fryman* v. *United States*, 901 F. 2d 79, 80 (CA7), cert. denied, 498 U. S. 920 (1990).

on the ground that the 1928 Act immunizes it from liability for all personal injuries caused by its employees in federal flood-control projects. Following this Court's unfortunate decision in *James*, as well as settled precedent in the Ninth Circuit,[3] the District Court and the Court of Appeals sustained that defense.

Since 1928 when Congress authorized the construction of the levees on the banks of the Mississippi River, the number and importance of federal flood-control projects has grown dramatically. In addition to controlling floods, these projects generate hydroelectric power and create artificial lakes that serve important recreational and conservation purposes. In some Circuits the Government's flood-control immunity would not constitute a defense in the case of injuries resulting from Government conduct that was unrelated to any flood-control purpose, see, *e. g.*, *Boyd* v. *United States ex rel. United States Army, Corps of Engineers*, 881 F. 2d 895 (CA10 1989); *Hayes* v. *United States*, 585 F. 2d 701 (CA4 1978). If this case had arisen in one of those Circuits, the claim would likely succeed because Hiersche's assignment related to fish conservation and power generation, rather than flood control. But in the Ninth Circuit, if flood control was one of the purposes of the Act of Congress authorizing the project itself, the immunity applies.[4] The Seventh Circuit has suggested that immunity might depend on whether the flood-control activities at the project increased the probability of injury. See *Fryman* v. *United States*, 901 F. 2d 79 (CA7), cert. denied, 498 U. S. 920 (1990).

This Court has a duty to resolve conflicts among the courts of appeals. As several scholars have recognized, however, that duty is not absolute.[5] Some conflicts are tolerable. Others can be resolved more effectively by Congress. This is such a case.

---

[3] See *McCarthy* v. *United States*, 850 F. 2d 558 (1988), cert. denied, 489 U. S. 1052 (1989).

[4] See *McCarthy* v. *United States*, 850 F. 2d, at 562; see also *Zavadil* v. *United States*, 908 F. 2d 334 (CA8 1990) *(per curiam)*, cert. denied, 498 U. S. 1108 (1991); *Mocklin* v. *Orleans Levee District*, 877 F. 2d 427 (CA5 1989).

[5] See generally A. Hellman, Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem, Final Report: Phase I, pp. 65–80 (1991) (report of Federal Judicial Center); Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 Calif. L. Rev. 913, 929–931 (1983).

The statute at issue here is an anachronism. It was enacted 18 years before the Federal Tort Claims Act, 28 U. S. C. § 2671 *et seq.*, waived the Federal Government's sovereign immunity from liability for personal injuries. At the time of its enactment, no consideration was given to the power generation, recreational, and conservation purposes of flood-control projects, or to their possible impact on the then nonexistent federal liability for personal injury and death caused by the negligent operation of such projects. Today this obsolete legislative remnant is nothing more than an engine of injustice. Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained.

No. 91–976. MCGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. *v.* SWEETON ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 944 F. 2d 905.

No. 91–994. PENNSYLVANIA *v.* WELCH. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 401 Pa. Super. 393, 585 A. 2d 517.

No. 91–1090. SCHACHT ET AL. *v.* CATERPILLAR, INC.; and
No. 91–1095. BINKLEY ET AL. *v.* CATERPILLAR, INC. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 213 Ill. App. 3d 169, 571 N. E. 2d 1215.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These cases present the question whether, following our decision in *Caterpillar Inc.* v. *Williams*, 482 U. S. 386 (1987), a state-law cause of action is pre-empted under § 301 of the Labor Management Relations Act by a defense based on a collective-bargaining agreement. A state-law cause of action is pre-empted under § 301 if its resolution is "substantially dependent on analysis of a collective-bargaining agreement." *Electrical Workers* v. *Hechler*, 481 U. S. 851, 859, n. 3 (1987). See also *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 220 (1985).

In the decision below, petitioners based their claims solely on state law, but respondent's defense invoked the provisions of a collective-bargaining agreement. The Illinois court held that

petitioners' state-law claims were pre-empted under § 301 because their resolution was substantially dependent on interpretation of the applicable collective-bargaining agreement. 213 Ill. App. 3d 169, 175–176, 571 N. E. 2d 1215, 1218 (1991). Several Federal Courts of Appeals similarly have held that a court must look to defenses to determine whether a claim requires interpretation of a collective-bargaining agreement. See, *e. g.*, *Smith* v. *Colgate-Palmolive Co.*, 943 F. 2d 764, 769–771 (CA7 1991); *Hanks* v. *General Motors Corp.*, 859 F. 2d 67, 70 (CA8 1988).

By contrast, the Court of Appeals for the Third Circuit, relying on our decision in *Caterpillar Inc.* v. *Williams*, has held that "in order for there to be section 301 preemption, the plaintiff, in its well-pleaded complaint, must plead an action that requires interpretation of the collective bargaining agreement." That court accordingly examined the claims presented in the complaint and found no § 301 pre-emption. *Berda* v. *CBS Inc.*, 881 F. 2d 20, 25 (1989). See also *McCormick* v. *AT & T Technologies, Inc.*, 934 F. 2d 531, 545 (CA4 1991) (en banc) (Phillips, J., dissenting). The Illinois court below expressly rejected the reasoning of *Berda*.

I would grant certiorari to resolve this conflict.

No. 91–1220. VIEHWEG *v.* DEVEREUX. C. A. 8th Cir. Motion of petitioner to strike and for sanctions denied. Certiorari denied. Reported below: 950 F. 2d 729.

Rehearing Denied

No. 91–704. RAY *v.* CONSOLIDATED RAIL CORPORATION, AKA CONRAIL, 502 U. S. 1048;

No. 91–755. CORAL CONSTRUCTION CO. ET AL. *v.* KING COUNTY, WASHINGTON, 502 U. S. 1033;

No. 91–847. JOHNSON *v.* JOHNSON ET AL., 502 U. S. 1059;

No. 91–6236. GARGALLO *v.* QUICK & REILLY CLEARING CORP. ET AL., 502 U. S. 1038;

No. 91–6272. PRESSLER *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL., 502 U. S. 1039;

No. 91–6384. IN RE RETTIG, 502 U. S. 1029;

No. 91–6395. DAVIS *v.* STONE CONTAINER CORP., 502 U. S. 1042;

No. 91–6481. VON CRONEY *v.* GARRETT, SECRETARY OF THE NAVY, 502 U. S. 1063;

No. 91–6505. WORTH *v.* UNITED STATES, 502 U. S. 1064; and

No. 91–6648. ENO *v.* UNITED STATES, 502 U. S. 1080. Petitions for rehearing denied.

No. 90–7830. MILLER *v.* GEORGIA, 501 U. S. 1259. Petition for rehearing denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

No. 91–5257. HOLLAND *v.* UNITED STATES, 502 U. S. 969. Motion for leave to file petition for rehearing denied.

MARCH 10, 1992

Certiorari Denied

No. 91–7568 (A–673). PARKS *v.* REYNOLDS, WARDEN, ET AL. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 958 F. 2d 989.

MARCH 11, 1992

Miscellaneous Orders

No. 91–615. ALLIED-SIGNAL, INC., AS SUCCESSOR-IN-INTEREST TO THE BENDIX CORP. *v.* DIRECTOR, DIVISION OF TAXATION. Sup. Ct. N. J. [Certiorari granted, 502 U. S. 977.] Case restored to calendar for reargument during the April session. The parties are requested to simultaneously file with the Clerk of this Court and serve upon the parties, on or before 3 p.m., Friday, April 10, 1992, supplemental briefs addressing the following questions:

"1. Should the Court overrule *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U. S. 307 (1982), and *F. W. Woolworth Co.* v. *Taxation and Revenue Dept. of New Mexico*, 458 U. S. 354 (1982)?

"2. If *ASARCO* and *Woolworth* were overruled, should the decision apply retroactively?

"3. If *ASARCO* and *Woolworth* were overruled, what constitutional principles should govern state taxation of corporations doing business in several states?"

Replies thereto, if any, are to be filed with the Clerk and served upon the parties on or before noon, Friday, April 17, 1992. The views of *amici curiae* are invited.

No. 91–1420. GROWE, SECRETARY OF STATE OF MINNESOTA, ET AL. *v.* EMISON ET AL. Appeal from D. C. Minn. Motion to expedite consideration of jurisdictional statement granted. Ap-

pellees' response to the jurisdictional statement is to be filed with the Clerk of this Court and served upon counsel for appellants on or before 1 p.m., Monday, March 23, 1992.

MARCH 12, 1992

Certiorari Denied

No. 91-7599 (A-684). ROBISON *v.* REYNOLDS, WARDEN, ET AL. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 958 F. 2d 1013.

MARCH 13, 1992

Miscellaneous Order

No. A-687. RICHARDS, AS NEXT FRIEND OF PENNELL *v.* DELAWARE COURT OFFICIALS. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied.

MARCH 14, 1992

Miscellaneous Order

No. A-688. PENNELL, AS NEXT FRIEND OF PENNELL *v.* RISLEY, ADULT BUREAU CHIEF, DELAWARE DEPARTMENT OF CORRECTION. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied.

MARCH 20, 1992

Probable Jurisdiction Noted

No. 91-1502. FRANKLIN, SECRETARY OF COMMERCE, ET AL. *v.* MASSACHUSETTS ET AL. Appeal from D. C. Mass. Motion to expedite consideration of statement as to jurisdiction granted. Probable jurisdiction noted. Motion to permit filings initially in typewritten form granted. The joint appendix is to be filed by Wednesday, March 25, 1992. If the State of Washington should wish to file any further papers on the application for stay, it must do so by Wednesday, March 25, 1992. Briefs on the merits are to be filed by the parties with the Clerk of this Court and served upon the parties on or before 3 p.m., Monday, April 13, 1992. Replies thereto, if any, are to be filed with the Clerk and served

upon the parties on or before 3 p.m., Monday, April 20, 1992. The case is set for oral argument on Tuesday, April 21, 1992. Reported below: 785 F. Supp. 230.

MARCH 23, 1992

Vacated and Remanded on Appeal

No. 90–1977. DUPREE ET AL. *v.* MOORE, ATTORNEY GENERAL OF MISSISSIPPI, ET AL. Appeal from D. C. S. D. Miss. Judgment vacated and case remanded for further consideration in light of *Clark* v. *Roemer*, 500 U. S. 646 (1991). Reported below: 776 F. Supp. 290.

No. 91–1210. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* JEFFERS ET AL. Appeal from D. C. E. D. Ark. Judgment vacated and case remanded with instructions to enter a fresh judgment from which an appeal may be taken to the United States Court of Appeals for the Eighth Circuit. Reported below: 776 F. Supp. 465.

Certiorari Granted—Vacated and Remanded

No. 90–1164. SMITH *v.* BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stringer* v. *Black*, *ante*, p. 222. Reported below: 904 F. 2d 950.

No. 91–432. MOORE *v.* NEVADA. Sup. Ct. Nev. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dawson* v. *Delaware*, *ante*, p. 159. Reported below: 107 Nev. 243, 810 P. 2d 759.

No. 91–701. ILLINOIS *v.* KELK. App. Ct. Ill., 4th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Jimeno*, 500 U. S. 248 (1991). JUSTICE STEVENS dissents. Reported below: 208 Ill. App. 3d 313, 566 N. E. 2d 835.

No. 91–885. EASLEY *v.* SOUTHERN SHIPBUILDING CORP. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Southwest Marine, Inc.* v. *Gizoni*, 502 U. S. 81 (1991). Reported below: 936 F. 2d 839.

No. 91–5293. FLANAGAN *v.* NEVADA. Sup. Ct. Nev. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dawson* v. *Delaware*, *ante*, p. 159. Reported below: 107 Nev. 243, 810 P. 2d 759.

No. 91–5787. PROWS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCarthy* v. *Madigan*, *ante*, p. 140. Reported below: 933 F. 2d 1004.

No. 91–6700. KOCHEKIAN *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williams* v. *United States*, *ante*, p. 193. Reported below: 938 F. 2d 456.

No. 91–7135. JEFFERIES *v.* SOUTH CAROLINA. Ct. App. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Yates* v. *Evatt*, 500 U. S. 391 (1991). Reported below: 304 S. C. 141, 403 S. E. 2d 169.

Miscellaneous Orders

No. ———. TRAVERS ET AL. *v.* BULLIS SCHOOL, INC. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–681. UNION MORTGAGE CO., INC. *v.* BARLOW ET AL. Sup. Ct. Ala. Application for stay of mandate, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–1066. IN RE DISBARMENT OF KROS. James John Kros, of Aurora, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 13, 1992 [502 U. S. 1026], is hereby discharged.

No. D–1068. IN RE DISBARMENT OF WHITE. Disbarment entered. [For earlier order herein, see 502 U. S. 1026.]

No. D–1069. IN RE DISBARMENT OF BAKER. Disbarment entered. [For earlier order herein, see 502 U. S. 1026.]

No. D–1074. IN RE DISBARMENT OF CLEMENTS. Disbarment entered. [For earlier order herein, see 502 U. S. 1054.]

No. D–1075. IN RE DISBARMENT OF PACK. Disbarment entered. [For earlier order herein, see 502 U. S. 1055.]

No. D–1076. IN RE DISBARMENT OF RATLIFF. Disbarment entered. [For earlier order herein, see 502 U. S. 1055.]

No. D–1094. IN RE DISBARMENT OF FEIGE. It is ordered that Hans Charles Otto Feige, of Coral Springs, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1095. IN RE DISBARMENT OF O'BRYAN. It is ordered that Adrian F. O'Bryan, of Louisville, Ky., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1096. IN RE DISBARMENT OF GARRICK. It is ordered that Max Carleton Garrick, Jr., of Whittier, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1097. IN RE DISBARMENT OF FRIEDMAN. It is ordered that Bruce Alan Friedman, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1098. IN RE DISBARMENT OF KENNEY. It is ordered that Michael Thomas Kenney, of Santa Ana, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90–1258. GOMEZ, WARDEN, DEUEL VOCATIONAL INSTITUTION OF CALIFORNIA *v.* MCKINNEY, 502 U. S. 1025. Motion of respondent to retax costs granted.

No. 90–1918. KRAFT GENERAL FOODS, INC. *v.* IOWA DEPARTMENT OF REVENUE AND FINANCE. Sup. Ct. Iowa. [Certiorari

granted, 502 U. S. 1056.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–8370. MEDINA *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 502 U. S. 924.] Motion of petitioner for leave to file a supplemental brief after argument denied.

No. 91–155. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. *v.* LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE; and

No. 91–339. LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 502 U. S. 1022.] Motion of petitioners/cross-respondents to strike *amicus curiae* brief of Airports Association Council International-North America denied.

No. 91–538. FORSYTH COUNTY, GEORGIA *v.* NATIONALIST MOVEMENT. C. A. 11th Cir. [Certiorari granted, 502 U. S. 1023.] Motions of American Civil Liberties Union et al. and Public Citizen for leave to file briefs as *amici curiae* granted.

No. 91–542. WRIGHT, WARDEN, ET AL. *v.* WEST. C. A. 4th Cir. [Certiorari granted, 502 U. S. 1012.] Motions of Benjamin R. Civiletti et al. and Gerald Gunther et al. for leave to file briefs as *amici curiae* granted.

No. 91–744. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.; and

No. 91–902. CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 502 U. S. 1056.] Motion of Alan Ernest to represent children unborn and born alive denied. Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 91–790. CSX TRANSPORTATION, INC. *v.* EASTERWOOD. C. A. 11th Cir.;

No. 91–1206. EASTERWOOD *v.* CSX TRANSPORTATION, INC. C. A. 11th Cir.;

No. 91–1111. HARTFORD FIRE INSURANCE CO. ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir.;

No. 91–1128. MERRETT UNDERWRITING AGENCY MANAGEMENT LTD. ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir.;

No. 91–1131. WINTHERTHUR REINSURANCE CORPORATION OF AMERICA *v.* CALIFORNIA. C. A. 9th Cir.; and

No. 91–1146. UNIONAMERICA INSURANCE CO. LTD. ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 91–849. BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT No. 21 *v.* ILLINOIS STATE BOARD OF EDUCATION ET AL.; and

No. 91–865. ILLINOIS STATE BOARD OF EDUCATION *v.* BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT No. 21 ET AL., 502 U. S. 1066. Motion of respondents Brozer et ux. for assessment of attorney's fees and costs denied.

No. 91–913. PATTERSON, TRUSTEE *v.* SHUMATE. C. A. 4th Cir. [Certiorari granted, 502 U. S. 1057.] Motion of David B. Tatge, Trustee, for leave to file a brief as *amicus curiae* granted.

No. 91–946. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 905.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 91–1188. ROWLAND, FORMER DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNCIL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 905.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 91–6109. GILBERTSON *v.* GRAHAM ET AL., 502 U. S. 1003. Motion of respondent Walker for attorney's fees denied.

No. 91–6194. CROSBY *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, *ante*, p. 905.] Motion for appointment of counsel granted, and it is ordered that Mark D. Nyvold, Esq., of St. Paul, Minn., be appointed to serve as counsel for petitioner in this case.

No. 91–7064. TOLIVER *v.* COUNTY OF SULLIVAN ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 13, 1992, within

which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 91–7451. IN RE LEE. Petition for writ of habeas corpus denied.

No. 91–7084. IN RE MARTIN;
No. 91–7085. IN RE MEADE;
No. 91–7256. IN RE COX; and
No. 91–7428. IN RE JOHNS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 91–871. BATH IRON WORKS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 942 F. 2d 811.

No. 91–948. CHURCH OF THE LUKUMI BABALU AYE, INC., ET AL. *v.* CITY OF HIALEAH. C. A. 11th Cir. Certiorari granted. Reported below: 936 F. 2d 586.

No. 91–998. COMMISSIONER OF INTERNAL REVENUE *v.* SOLIMAN. C. A. 4th Cir. Certiorari granted. Reported below: 935 F. 2d 52.

No. 91–1158. MISSISSIPPI ET AL. *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition and to the following question: Did the District Court properly assert jurisdiction over respondents' third-party complaint against petitioner State of Mississippi? Reported below: 937 F. 2d 247.

No. 91–6824. ZAFIRO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 945 F. 2d 881.

Certiorari Denied

No. 91–851. MEDLEY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 33 M. J. 75.

No. 91–929. KIMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 939 F. 2d 776.

No. 91–942. RICHARDSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 943 F. 2d 1107.

No. 91–944. COOPER ELECTRIC SUPPLY CO. ET AL. *v.* MARTIN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 940 F. 2d 896.

No. 91–969. ALLEN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 33 M. J. 209.

No. 91–982. EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY CO., REPRESENTED BY THE UNITED TRANSPORTATION UNION ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 938 F. 2d 1009.

No. 91–991. GRIFFEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 943 F. 2d 428.

No. 91–1006. U. S. MARINE CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 944 F. 2d 1305.

No. 91–1007. CAINE *v.* HARDY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 943 F. 2d 1406.

No. 91–1026. EAST ALABAMA HEALTH CARE AUTHORITY, DBA EAST ALABAMA MEDICAL CENTER *v.* AUBURN MEDICAL CENTER, INC., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 583 So. 2d 1346.

No. 91–1036. JONES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1318.

No. 91–1041. TAITAGUE ET AL. *v.* FIRST ISLAND INDUSTRY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 794.

No. 91–1062. SCHATZ ET UX. *v.* WEINBERG & GREEN. C. A. 4th Cir. Certiorari denied. Reported below: 943 F. 2d 485.

No. 91–1068. EDWARDS ET AL., DBA CARL EDWARDS & SONS STABLES *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1318.

No. 91–1139. FRANKLIN SAVINGS ASSN. ET AL. *v.* DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 934 F. 2d 1127.

No. 91–1175. MORGAN *v.* COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 231 Cal. App. 3d 243, 284 Cal. Rptr. 745.

No. 91–1178. BASHAM *v.* BLANKENSHIP ET AL. Ct. App. Okla. Certiorari denied.

No. 91–1184. ERICKSON ET AL. *v.* DESERT PALACE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 694.

No. 91–1191. HECKER *v.* FRANKLIN NATIONAL BANK. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 37, 946 F. 2d 127.

No. 91–1194. COMMITTEE OF UNSECURED CREDITORS *v.* MELLON BANK, N. A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 2d 635.

No. 91–1201. SHUTT *v.* SANDOZ CROP PROTECTION CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 1431.

No. 91–1204. ROBINSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 305 S. C. 469, 409 S. E. 2d 404.

No. 91–1205. LAVERGNE *v.* CAMERON IRON WORKS. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 2d 400.

No. 91–1207. FRONT ROYAL & WARREN COUNTY INDUSTRIAL PARK CORP. ET AL. *v.* TOWN OF FRONT ROYAL, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 945 F. 2d 760.

No. 91–1212. MITCHELL *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 944 F. 2d 911.

No. 91–1214. BROOKS *v.* SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1050.

No. 91–1219. CULLY *v.* COTOFAN. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 1438, 579 N. E. 2d 212.

No. 91–1222. CALIFORNIA ELECTRIC CO. *v.* BRILEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 939 F. 2d 790.

No. 91–1224. OUZTS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 91–1226. DAVIS ET AL. *v.* HOLLIS. C. A. 11th Cir. Certiorari denied. Reported below: 941 F. 2d 1471.

No. 91–1228. CSOKA *v.* WALDEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–1230. HOUSTON LIGHTING & POWER CO. *v.* MORRIS, JUDGE (CITY OF SAN ANTONIO ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Tex. Certiorari denied.

No. 91–1232. NORMAN, EXECUTRIX OF THE ESTATE OF NORMAN, DECEASED *v.* VIRGINIA ELECTRIC & POWER CO. C. A. 4th Cir. Certiorari denied. Reported below: 941 F. 2d 1207.

No. 91–1235. NAVARRO, SHERIFF OF BROWARD COUNTY *v.* REVIEW PUBLICATIONS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1318.

No. 91–1237. HAMILTON *v.* AIR JAMAICA, LTD. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 2d 74.

No. 91–1238. PATY ET AL. *v.* PRICE, AKA MAUI LOA, ET AL.; and

No. 91–1273. PRICE ET AL. *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 939 F. 2d 702.

No. 91–1244. HYPOINT TECHNOLOGY, INC. *v.* HEWLETT-PACKARD CO. C. A. 6th Cir. Certiorari denied. Reported below: 949 F. 2d 874.

No. 91–1246. ARLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 139.

No. 91–1247. MARX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 930 F. 2d 1246.

No. 91–1249. NOWERS *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 91–1250. MCALLAN *v.* KERR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1275.

No. 91–1253. COOK *v.* CAIN. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 891.

No. 91–1256. KLAVONICK *v.* IRONWORKERS OF WESTERN PENNSYLVANIA BENEFITS PLANS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 944 F. 2d 897.

No. 91–1258. BOYD ET UX. *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 283.

No. 91–1261. TEXAS *v.* WALKER. Ct. Crim. App. Tex. Certiorari denied. Reported below: 823 S. W. 2d 247.

No. 91–1262. BOWERS ET AL. *v.* PERKO. C. A. 8th Cir. Certiorari denied. Reported below: 945 F. 2d 1038.

No. 91–1264. SOEHNGEN *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 945 F. 2d 418.

No. 91–1277. FARSACI *v.* BUSH, PRESIDENT OF THE UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 91–1279. KULZER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF KULZER, DECEASED *v.* OWENS-CORNING FIBERGLAS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 942 F. 2d 122.

No. 91–1287. IRBY ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 935 F. 2d 1291.

No. 91–1294. PARKER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 124 N. J. 628, 592 A. 2d 228.

No. 91–1297. OHIO DEPARTMENT OF HUMAN SERVICES *v.* OHIO HOSPITAL ASSN. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 97, 579 N. E. 2d 695.

No. 91–1307. RANGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1544.

No. 91–1318. METALLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 795.

No. 91–1336. REICHLIN *v.* WILLIAMS, NOVACK & HANSEN ET AL. Ct. App. Wash. Certiorari denied. Reported below: 59 Wash. App. 1009.

No. 91–1338. GIRLING HEALTH SYSTEMS, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 949 F. 2d 1145.

No. 91–1343. GOOS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 935.

No. 91–1357. PERALTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 941 F. 2d 1003.

No. 91–1364. HASSNEH INSURANCE COMPANY OF ISRAEL, LTD. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (GARAMENDI, INSURANCE COMMISSIONER OF CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–5006. J. E. B. *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 161 Wis. 2d 655, 469 N. W. 2d 192.

No. 91–6461. CUNNINGHAM *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 941 F. 2d 535.

No. 91–6490. HESTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 940 F. 2d 1542.

No. 91–6510. YOUNG *v.* HERRING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 938 F. 2d 543.

No. 91–6611. PURVIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 932 F. 2d 1413.

No. 91–6633. WILLIAMS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 945 F. 2d 416.

No. 91–6661. GIBSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 91–6666. MOSCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 946 F. 2d 882.

No. 91–6676. ZAVESKY *v.* TOWN OF SCHERERVILLE, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 2d 666.

No. 91–6693. FISHER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 587 So. 2d 1039.

No. 91–6722. KELLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 938 F. 2d 1553.

No. 91–6726. PARMASAVAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 934 F. 2d 595.

No. 91–6742. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 2d 406.

No. 91–6774. BARNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 2d 1296.

No. 91–6805. BODRE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 948 F. 2d 28.

No. 91–6806. SWAN ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 940 F. 2d 654.

No. 91–6811. DUNNICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 910.

No. 91–6814. FRAZIER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 3d 247, 574 N. E. 2d 483.

No. 91–6817. DONOVAN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 291 U. S. App. D. C. 84, 938 F. 2d 1343.

No. 91–6825. DUNSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 2d 989.

No. 91–6833. NAVARRO-BOTELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 318.

No. 91–6839. OGUNLEYE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 940 F. 2d 655.

No. 91–6850. EDDMONDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 143 Ill. 2d 501, 578 N. E. 2d 952.

No. 91–6853. CRUZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 937.

No. 91–6869. ESCOLASTICO-DISLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 91–6886. ABATE *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 1533.

No. 91–6891. BEVILL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 91–6910. SOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 945 F. 2d 409.

No. 91–6953. COHEN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 305 S. C. 432, 409 S. E. 2d 383.

No. 91–6965. PINKSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 1285.

No. 91–6992. CABRAL PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 888.

No. 91–6995. ALLEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 943 F. 2d 58.

No. 91–7007. KHAN *v.* TANNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 941 F. 2d 1207.

No. 91–7017. FRALEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 936 F. 2d 570.

No. 91–7037. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 53 Cal. 3d 1115, 811 P. 2d 757.

No. 91–7053. WHITLOCK *v.* O'LEARY, ASSISTANT DEPUTY DIRECTOR, ADULT INSTITUTIONS, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–7056. BATTENFIELD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 816 P. 2d 555.

No. 91–7058. CUNNINGHAM *v.* WOODMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 790.

No. 91–7060. CLARKE *v.* CLARKE COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1163.

No. 91–7062. SALIM *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 886.

No. 91–7063. N. S. *v.* EL PASO COUNTY, COLORADO, DEPARTMENT OF SOCIAL SERVICES, ET AL. Ct. App. Colo. Certiorari denied.

No. 91–7065. HARRIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 91–7066. HOLMAN *v.* O'LEARY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 91–7070. GONZALEZ-CALAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 947 F. 2d 646.

No. 91–7071. DILL, AKA TUCKER *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7074. BOUDETTE ET AL. *v.* COUNTY OF YAVAPAI ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7075. RUIZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 946 F. 2d 901.

No. 91–7079. RITCHERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 508.

No. 91–7083. MOORE, AKA SAVAGE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 588 So. 2d 975.

No. 91–7089. FRANZEN *v.* WRIGHT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 949.

No. 91–7098. SULLY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 53 Cal. 3d 1195, 812 P. 2d 163.

No. 91–7101. MONTGOMERY *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–7102. THOMASON *v.* UNITED STATES STEEL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 947 F. 2d 948.

No. 91–7104. MOISTER *v.* FIRST NATIONAL BANK OF ATLANTA. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 887.

No. 91–7111. SMITH *v.* LYNAUGH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 344.

No. 91–7115. HARDING *v.* REDMAN, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 91–7118. BACCHUS *v.* POSTMAN. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 581 So. 2d 1324.

No. 91–7120. SCOTT *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 91–7123. SIMMONS *v.* BEYER, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7130. STARKS *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 52.

No. 91–7132. IDZIAK *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 91–7133. HENRY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1542.

No. 91–7134. HOWARD *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7136. IN RE JESSE. Sup. Ct. Mo. Certiorari denied.

No. 91–7138. LUCIEN *v.* PETERS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 91–7139. LUCIEN *v.* JOHNSON, COMMISSIONER, COURT OF CLAIMS. C. A. 7th Cir. Certiorari denied.

No. 91–7140. LUCIEN *v.* ROPER ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–7141. REININGHAUS *v.* REININGHAUS. Sup. Ct. Mont. Certiorari denied. Reported below: 250 Mont. 86, 817 P. 2d 1159.

No. 91–7145. GALBRAITH *v.* NORTHERN TELECOM, INC. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 275.

No. 91–7147. CHUNG KUN YIM *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 896.

No. 91–7149. FRANCOIS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 730.

No. 91–7150. HUNTER *v.* ROBERTS ET AL. C. A. 11th Cir. Certiorari denied.

No. 91–7153. RITCHERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 508.

No. 91–7154. MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1488.

No. 91–7156. PETILLO *v.* MCCLELLAN, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 91–7157. OWENS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 941.

No. 91–7158. ZIMMERMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 529 Pa. 633, 600 A. 2d 953.

No. 91–7160. ATEN, EXECUTRIX OF THE ESTATE OF PORCARO *v.* NEUBERT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 934.

No. 91–7162. PARZIALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 123.

No. 91–7163. ROLLINS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 91–7164. REINBOLD *v.* DEWEY COUNTY BANK. C. A. 8th Cir. Certiorari denied. Reported below: 942 F. 2d 1304.

No. 91–7165. MARIN *v.* BRIGHAM YOUNG UNIVERSITY. C. A. 10th Cir. Certiorari denied.

No. 91–7166. LOVINGS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–7171. JUSTICE *v.* LTV STEEL CO., INC., FOR ITSELF AND AS SUCCESSOR TO REPUBLIC STEEL CORP., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1277.

No. 91–7172. HUFFSMITH *v.* WYOMING COUNTY PRISON BOARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7177. SIRECI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 587 So. 2d 450.

No. 91–7178. YEATTS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 242 Va. 121, 410 S. E. 2d 254.

No. 91–7183. FERGUSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 2d 396.

No. 91–7204. HARRIS *v.* SIVLEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 949.

No. 91–7207. CONNER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 580 N. E. 2d 214.

No. 91–7210. WAGGONER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1543.

No. 91–7212. LOWE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1296.

No. 91–7213. HARDY *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–7220. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 946 F. 2d 1344.

No. 91–7221. PHILLIPE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 91–7225. RUGGLES *v.* CITY OF RIVERSIDE. C. A. 9th Cir. Certiorari denied.

No. 91–7226. ALBURY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7230. BATTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 946.

No. 91–7235. MINOTA-GUERRERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7237. MCFADDEN *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 732.

No. 91–7238. WARD *v.* WARD. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 659, 409 S. E. 2d 518.

No. 91–7241. KENNEDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1291.

No. 91–7254. ANDREWS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 91–7259. FAIRMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1479.

No. 91–7261. GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 737.

No. 91–7265. DIAZ *v.* TERRELL ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–7266. ROGERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 945 F. 2d 414.

No. 91–7267. PELAEZ-CARMONA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1297.

No. 91–7268. MORENO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 905.

No. 91–7281. LAWSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 947 F. 2d 849.

No. 91–7284. HARRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1283.

No. 91–7289. CANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 948 F. 2d 1292.

No. 91–7290. STRAUGHTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 950 F. 2d 1223.

No. 91–7291. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7296. HARPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 946 F. 2d 1373.

No. 91–7297. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 934 F. 2d 320.

No. 91–7303. SAMUELS *v.* HAWLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1290.

No. 91–7305. PINK *v.* UNITED STATES; and
No. 91–7349. RODNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–7306. OSEGUERA-LUCATERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 1286.

No. 91–7307. POOLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1291.

No. 91–7310. ARACHE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 946 F. 2d 129.

No. 91–7318. MALONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 951.

No. 91–7319. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–7321. ZEPEDA *v.* DORSEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1295.

No. 91–7322. CRUM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1288.

No. 91–7324. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 948 F. 2d 1293.

No. 91–7329. MATA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 944 F. 2d 60.

No. 91–7330. OAKLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 944 F. 2d 384.

No. 91–7331. MURACCIOLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 903.

No. 91–7334. GRUNDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 2d 405.

No. 91–7338. FOWLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–7341. SKILLERN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1268.

No. 91–7346. MOORE *v.* DEPUTY COMMISSIONER OF THE STATE CORRECTIONAL INSTITUTION AT HUNTINGDON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 946 F. 2d 236.

No. 91–7353. GILES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–7357. ROARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1490.

No. 91–7359. SMYLIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7361. BAUMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1191.

No. 91–7362. VACCARO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 946 F. 2d 902.

No. 91–7364. ABADIA, AKA OCHOA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 949 F. 2d 956.

No. 91–7368. GILBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 942 F. 2d 1537.

No. 91–7369. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 954.

No. 91–7372. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 190, 948 F. 2d 782.

No. 91–7373. MINICONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 960 F. 2d 1099.

No. 91–7374. MAYA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1162.

No. 91–7382. ABREGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1290.

No. 91–7393. DOE *v.* GROSS ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 411 Mass. 512, 583 N. E. 2d 1263.

No. 91–7396. GREENE *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1159.

No. 91–7418. SAVAGE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 953 F. 2d 632.

No. 91–7422. JOZWIAK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 954 F. 2d 458.

No. 90–1861. GREENVILLE PUBLIC SCHOOL DISTRICT ET AL. *v.* WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL. Sup. Ct. Miss. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 575 So. 2d 956.

No. 91–977. DISTRICT 6, INTERNATIONAL UNION OF INDUSTRIAL SERVICE, TRANSPORT & HEALTH EMPLOYEES *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 91–1025. HUMAN DEVELOPMENT ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of these petitions. Reported below: 290 U. S. App. D. C. 339, 937 F. 2d 657.

No. 91–1040. PENTHOUSE INTERNATIONAL, LTD. *v.* MEESE, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no

part in the consideration or decision of this petition. Reported below: 291 U. S. App. D. C. 183, 939 F. 2d 1011.

No. 91-996. CALIFORNIA *v.* CRIBAS. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* without an affidavit of indigency executed by respondent granted. Certiorari denied. Reported below: 231 Cal. App. 3d 596, 282 Cal. Rptr. 538.

No. 91-1002. YOUNG & RUBICAM, INC. *v.* MIDLER; and
No. 91-1199. MIDLER *v.* YOUNG & RUBICAM, INC. C. A. 9th Cir. Motion of American Association of Advertising Agencies, Inc., for leave to file a brief as *amicus curiae* in No. 91-1002 granted. Certiorari denied. Reported below: 944 F. 2d 909.

No. 91-1009. SCHOWENGERDT *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied. Reported below: 944 F. 2d 483.

No. 91-1159. MOURADIAN *v.* JOHN HANCOCK COS. ET AL. C. A. 1st Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied. Reported below: 930 F. 2d 972.

No. 91-1196. HEGGY *v.* HEGGY. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 944 F. 2d 1537.

No. 91-1331. PIPEFITTERS' ASSOCIATION LOCAL UNION NO. 597 *v.* DANIELS. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 945 F. 2d 906.

No. 91-6681. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 944 F. 2d 618.

No. 91-6685. CALDERON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 946 F. 2d 880.

No. 91-6830. BARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 946 F. 2d 891.

No. 91–6849. FRIERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 945 F. 2d 650.

No. 91–1216. SUTHERLAND *v.* SUTHERLAND. Ct. App. Cal., 2d App. Dist. Motions of Institute in Basic Life Principles et al. and Lincoln Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 91–1236. ABRAHAM, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY *v.* HARRIS ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 946 F. 2d 214.

No. 91–1240. ENGELKE *v.* SCHER. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 943 F. 2d 921.

No. 91–1280. ZANT, WARDEN *v.* HORTON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 941 F. 2d 1449.

No. 91–7002. BAILEY *v.* NOOT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 940 F. 2d 1150.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue in this case is whether the *Ex Post Facto* Clause of the Constitution, Art. I, § 9, cl. 3, is violated when a newly modified state parole regulation is applied to a prisoner who began serving his sentence prior to the rule change.

Petitioner pleaded guilty to the 1976 kidnap, sexual abuse, and murder of a young girl; he was sentenced to three concurrent jail terms, the longest of which was 40 years. In 1981, the Minnesota Corrections Board determined that, because of the severity of petitioner's crimes, the target date for his release should be the expiration of his sentence. In a letter to petitioner, the board stated that it would "not consider any form of release prior to the expiration of your sentence unless psychiatric, psychological, and correctional staff can certify that you are no longer a danger to the public in general and/or young females specifically."

A year later, the Minnesota Legislature abolished the corrections board and transferred parole responsibility to the commis-

sioner of corrections. Minn. Stat. § 243.05 (1990). The commissioner enacted new parole regulations, including a rule that "[a]ll release dates established by the Minnesota corrections board will be left in full force and effect by the commissioner." 3 Minn. Rule § 2940.1500, subp. 2 (1991). Petitioner was informed that this new regulation effectively froze his release date.

Petitioner filed this civil rights action under Rev. Stat. § 1979, 42 U. S. C. § 1983, asserting that application of the new parole regulation to his case violated the *Ex Post Facto* Clause. The United States District Court for the District of Minnesota entered summary judgment for respondents. A divided panel of the Court of Appeals for the Eighth Circuit affirmed, holding that "the Minnesota parole regulations are not 'laws' for ex post facto purposes . . . ." *Bailey* v. *Gardebring*, 940 F. 2d 1150, 1157 (1991). The court, again divided, denied rehearing en banc.

The judgment of the Court of Appeals conflicts with decisions of other Courts of Appeals, which have held that application of changed state parole regulations may pose *ex post facto* problems. See, *e. g.*, *Akins* v. *Snow*, 922 F. 2d 1558 (CA11), cert. denied, 501 U. S. 1260 (1991); *Royster* v. *Fauver*, 775 F. 2d 527 (CA3 1985). Because the issue is likely to arise frequently, I would grant certiorari to resolve the disagreement.

No. 91-7239. MOUNT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 953 F. 2d 634.

Rehearing Denied

No. 91-899. SLOAN *v.* UNITED STATES, 502 U. S. 1060;

No. 91-5477. BROWN *v.* UNITED STATES, 502 U. S. 1075;

No. 91-5613. WADE *v.* GEORGIA, 502 U. S. 1060;

No. 91-6199. KENNEDY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 502 U. S. 1066;

No. 91-6225. AHMED *v.* STONE, SECRETARY, DEPARTMENT OF THE ARMY, 502 U. S. 1062;

No. 91-6334. CHALK *v.* HARRISON ET AL., 502 U. S. 1041;

No. 91-6469. SMYTHE *v.* GREEN ET AL., 502 U. S. 1063;

No. 91-6474. STONE *v.* DALLMAN, WARDEN, 502 U. S. 1063;

No. 91-6514. WHITE *v.* ALABAMA, 502 U. S. 1076;

No. 91-6523. LOMBARD *v.* NEW YORK CITY BOARD OF EDUCATION ET AL., 502 U. S. 1064;

No. 91–6563. BRYMER *v.* HESSON, ACTING WARDEN, ET AL., 502 U. S. 1077; and

No. 91–6649. GREENE *v.* TELEDYNE ELECTRONICS, 502 U. S. 1080. Petitions for rehearing denied.

No. 91–5694. FERGUSON *v.* GIANT FOODS, INC., 502 U. S. 927. Petition for rehearing denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

MARCH 24, 1992

Dismissals Under Rule 46

No. 91–6894. SHANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 947 F. 2d 1263.

No. 91–7200. CASTILLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari dismissed under this Court's Rule 46. Reported below: 176 App. Div. 2d 609, 575 N. Y. S. 2d 49.

MARCH 27, 1992

Dismissal Under Rule 46

No. 91–1335. WALKER ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA (EXXON CORP., REAL PARTY IN INTEREST). C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.

Miscellaneous Orders

No. A–700. CAMP, SECRETARY OF STATE OF ALABAMA *v.* WESCH ET AL. D. C. S. D. Ala. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Motion to expedite consideration of the jurisdictional statement denied. Motion to permit filings initially in typewritten form granted.

No. 91–1502 (A–696). FRANKLIN, SECRETARY OF COMMERCE, ET AL. *v.* MASSACHUSETTS ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 929.] Application for stay, presented to JUSTICE SOUTER, and by him referred to the Court, granted, and it is ordered that the judgment of the United States District Court for the District of Massachusetts, case No. Civ. 91–11234–

WD, be stayed pending disposition of the appeal in this Court. In the event the judgment is affirmed, this order is to terminate automatically. If the judgment is vacated or reversed, this stay is to remain in effect pending the sending down of the judgment of this Court.

MARCH 30, 1992

Dismissal Under Rule 46

No. 91–1288. KINDIG ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. D. C. Cir. Certiorari dismissed as to petitioner Valentine under this Court's Rule 46.

Miscellaneous Orders

No. ———. CUEVAS *v.* UNITED STATES; and
No. ———. HALAS *v.* QUIGG. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A–642. PANDEY *v.* UNITED STATES. Application for release, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–670 (91–1494). GUNTER ET AL. *v.* ABDULLAH. C. A. 8th Cir. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. A–689. AYARS ET UX. *v.* NEW JERSEY. Application for bail, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–1065. IN RE DISBARMENT OF SOLOWITCH. Eric Steven Solowitch, of University Heights, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 13, 1992 [502 U. S. 1026], is hereby discharged.

No. D–1071. IN RE DISBARMENT OF WILEY. Disbarment entered. [For earlier order herein, see 502 U. S. 1054.]

No. D–1072. IN RE DISBARMENT OF TRUDGEON. Disbarment entered. [For earlier order herein, see 502 U. S. 1054.]

No. D–1073. IN RE DISBARMENT OF ZADAN. Disbarment entered. [For earlier order herein, see 502 U. S. 1054.]

No. D–1077. IN RE DISBARMENT OF SWICKLE. Disbarment entered. [For earlier order herein, see 502 U. S. 1055.]

No. D–1080. IN RE DISBARMENT OF BRYAN. Disbarment entered. [For earlier order herein, see 502 U. S. 1055.]

No. D–1099. IN RE DISBARMENT OF HART. It is ordered that Henry Clay Hart, Jr., of Morgantown, W. Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1100. IN RE DISBARMENT OF CUNNINGHAM. It is ordered that Michael Eaton Cunningham, of Brick, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1101. IN RE DISBARMENT OF WATSON. It is ordered that Mark Temple Watson, of Elizabethtown, Ky., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1102. IN RE DISBARMENT OF CONNER. It is ordered that Kurt R. Conner, of North Wilkesboro, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1103. IN RE DISBARMENT OF WINN. It is ordered that Newton Alfred Winn, of St. Petersburg, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1104. IN RE DISBARMENT OF BLANK. It is ordered that Gary L. Blank, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1105. IN RE DISBARMENT OF MEKAS. It is ordered that Peter G. Mekas, of Reed City, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 91–471. CHEMICAL WASTE MANAGEMENT, INC. *v.* HUNT, GOVERNOR OF ALABAMA, ET AL. Sup. Ct. Ala. [Certiorari granted, 502 U. S. 1070.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–744. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.; and

No. 91–902. CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 502 U. S. 1056.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–538. FORSYTH COUNTY, GEORGIA *v.* NATIONALIST MOVEMENT. C. A. 11th Cir. [Certiorari granted, 502 U. S. 1023.] Motion of International Association of Chiefs of Police et al. for leave to file a brief as *amici curiae* granted.

No. 91–719. PARKE, WARDEN *v.* RALEY. C. A. 6th Cir. [Certiorari granted, *ante*, p. 905.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that J. Gregory Clare, Esq., of Louisville, Ky., be appointed to serve as counsel for respondent in this case.

No. 91–971. TWO PESOS, INC. *v.* TACO CABANA, INC. C. A. 5th Cir. [Certiorari granted, 502 U. S. 1071.] Motion of respondent to expedite consideration of motion to dismiss the writ as improvidently granted is granted. Motion of respondent to dismiss the writ as improvidently granted is denied.

No. 91–1010. PUERTO RICO AQUEDUCT AND SEWER AUTHORITY *v.* METCALF & EDDY, INC. C. A. 1st Cir. [Certiorari granted, *ante*, p. 918.] Motion of respondent for summary disposition denied.

No. 91–1270. RICHARDS, GOVERNOR OF TEXAS, ET AL. *v.* TERRAZAS ET AL. Appeal from D. C. W. D. Tex. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 91–1283. GREENBERG, INDEPENDENT EXECUTOR OF ESTATE OF MCGANN, DECEASED *v.* H & H MUSIC CO. ET AL. C. A. 5th Cir. Motions of American Public Health Association et al., Bay Area Lawyers for Individual Freedom et al., and Michigan Protection & Advocacy for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 91–6619. SHANNON ET UX. *v.* UNITED SERVICES AUTOMOBILE ASSN. ET AL. Sup. Ct. Wis.; and

No. 91–7252. NEWMAN ET AL. *v.* ORENTREICH. Ct. App. N. Y. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 20, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

No. 91–6646. HADLEY *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 905.] Motion for appointment of counsel granted, and it is ordered that John Trebon, Esq., of Flagstaff, Ariz., be appointed to serve as counsel for petitioner in this case.

No. 91–7511. IN RE ZZIE; and

No. 91–7542. IN RE GATES. Petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 91–1420. GROWE, SECRETARY OF STATE OF MINNESOTA, ET AL. *v.* EMISON ET AL. Appeal from D. C. Minn. Probable jurisdiction noted. Reported below: 782 F. Supp. 427.

Certiorari Granted

No. 91–1043. PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL. *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 944 F. 2d 1525.

No. 91–10. SPECTRUM SPORTS, INC., ET AL. *v.* MCQUILLAN ET VIR, DBA SORBOTURF ENTERPRISES. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 907 F. 2d 154.

No. 91–7094. RICHMOND *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Motion of

petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 948 F. 2d 1473.

Certiorari Denied

No. 91–758. CRUZ RASA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 2d 1063.

No. 91–961. INTERNATIONAL CHEMICAL CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 940 F. 2d 1538.

No. 91–1058. MCBRIDE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 943 F. 2d 57.

No. 91–1097. WARD *v.* SECRETARY OF TRANSPORTATION. C. A. 1st Cir. Certiorari denied. Reported below: 943 F. 2d 157.

No. 91–1104. KEGLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 806 and 923 F. 2d 764.

No. 91–1123. RIVES ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 934 F. 2d 1171.

No. 91–1124. HAVASUPAI TRIBE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 943 F. 2d 32.

No. 91–1155. SMITH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SMITH, ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1318.

No. 91–1266. WILSON ET AL. *v.* KARR, TUTTLE, KOCH, CAMPBELL, MAWER, MORROW & SAX ET AL. Ct. App. Wash. Certiorari denied. Reported below: 61 Wash. App. 1045.

No. 91–1268. CITY OF NEWPORT ET AL. *v.* LEE, DBA BRASS BULL. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 945.

No. 91–1275. WILKERSON *v.* LAKE COUNTY SUPERIOR COURT ET AL. Sup. Ct. Ind. Certiorari denied.

No. 91–1276. GORDON ET UX. *v.* BOARD OF ZONING APPEALS, CARROLL COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 885.

No. 91–1278. FELDMAN *v.* GLUCROFT ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 580 So. 2d 866.

No. 91–1290. SCHWARZER *v.* DOUGLAS COUNTY, NEVADA. 9th Jud. Dist. Ct. Nev., County of Douglas. Certiorari denied.

No. 91–1291. CARLISLE ET AL. *v.* BRADSHAW ET AL. Sup. Ct. N. H. Certiorari denied. Reported below: 135 N. H. 7, 599 A. 2d 481.

No. 91–1293. LENDABARKER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 215 Ill. App. 3d 540, 575 N. E. 2d 568.

No. 91–1309. CORTEC INDUSTRIES, INC., ET AL. *v.* WESTINGHOUSE CREDIT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 949 F. 2d 42.

No. 91–1311. RAPPS, INDIVIDUALLY AND AS DIRECTOR OF THE MISSOURI DIVISION OF CHILD SUPPORT ENFORCEMENT, ET AL. *v.* JACKSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 947 F. 2d 332.

No. 91–1315. MIRMAN *v.* GRIEVANCE COMMITTEE FOR SECOND AND ELEVENTH JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 167 App. Div. 2d 60, 569 N. Y. S. 2d 981.

No. 91–1317. ADAM CAB, INC., DBA ADAM CAB CO. *v.* COLLINS, STATE REVENUE COMMISSIONER OF GEORGIA. Super. Ct. Chatham County, Ga. Certiorari denied.

No. 91–1319. LANGFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 798.

No. 91–1323. BURNEY *v.* OHIO (two cases). Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 91–1329. MOODY *v.* SMITH, TRUSTEE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 1194.

No. 91–1350. SPAETH ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 566.

No. 91–1358. SCHWARTZ *v.* CITY OF FLINT. Ct. App. Mich. Certiorari denied. Reported below: 187 Mich. App. 191, 466 N. W. 2d 357.

No. 91–1372. WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 175.

No. 91–1373. CALERO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1487.

No. 91–1386. LOWRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 942.

No. 91–1389. VIGIL *v.* SOLANO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 955.

No. 91–6300. KALTENBACH *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 91–6663. WALLACE *v.* ROBINSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 2d 243.

No. 91–6682. JEFFRESS *v.* JEFFRESS. Ct. App. Va. Certiorari denied.

No. 91–6781. KATTULA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 941 F. 2d 1207.

No. 91–6837. REED *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 344.

No. 91–6858. CHERIF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 2d 692.

No. 91–6859. RESTREPO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 946 F. 2d 654.

No. 91–6899. LOPEZ JAUREGUI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 945 F. 2d 409.

No. 91–6905. OCHOA-FABIAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 935 F. 2d 1139.

No. 91–6938. ALZAMORA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1296.

No. 91–6939. JERMOSEN *v.* SMITH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 945 F. 2d 547.

No. 91–6966. RAIBON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1542.

No. 91–7121. SINGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 937 F. 2d 600.

No. 91–7142. BLANKENSHIP *v.* ZANT, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 91–7168. GILES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. XXIX, 410 S. E. 2d 747.

No. 91–7173. BACCAM *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 476 N. W. 2d 884.

No. 91–7175. ROSS *v.* DAKOTA RAIL, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 946 F. 2d 82.

No. 91–7182. KEYES *v.* HUCKLEBERRY HOUSE ET AL.; and KEYES *v.* MCISSAC, CHIEF PROBATION OFFICER, CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 234 Cal. App. 3d 143, 285 Cal. Rptr. 633 (second case).

No. 91–7184. GREEN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 306 S. C. 94, 409 S. E. 2d 785.

No. 91–7189. AKIONA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 938 F. 2d 158.

No. 91–7190. SEWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 942 F. 2d 1209.

No. 91–7191. WILLIAMS *v.* BANKS. Super. Ct. Fulton County, Ga. Certiorari denied.

No. 91–7193. VORHAUER *v.* CONRAD ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7198. BOCLAIR *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 129 Ill. 2d 458, 544 N. E. 2d 715.

No. 91-7201. CARTWRIGHT *v.* WHITE, SUPERINTENDENT, ALGOA CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 91-7206. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 233 Cal. App. 3d 425, 284 Cal. Rptr. 579.

No. 91-7211. CORDLE *v.* SQUARE D CO. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 944.

No. 91-7214. GRIMES *v.* WELLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 349.

No. 91-7215. FANT *v.* TURNER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 91-7216. KALTENBACH *v.* STALDER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 91-7218. MERCHANT *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 91-7219. PAIGE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 37, 946 F. 2d 127.

No. 91-7223. MASUTH *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 575 N. E. 2d 714.

No. 91-7224. PATTILLO *v.* CITY OF LAS VEGAS, NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 107 Nev. 1131, 838 P. 2d 952.

No. 91-7228. MORGAN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 91-7232. HOFMANN *v.* PRESSMAN TOY CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 935.

No. 91-7234. LEE *v.* WALGREEN'S CO. ET AL. C. A. 7th Cir. Certiorari denied.

No. 91-7236. MOORE *v.* JAMES, JUDGE, SUPERIOR COURT OF DOUGLAS COUNTY. Sup. Ct. Ga. Certiorari denied.

No. 91–7245. RENEER *v.* SAMBERG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 895.

No. 91–7246. CONNOR *v.* MOBIL CHEMICAL CO. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–7271. STOKES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 91–7275. SMITH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 91–7276. GREEN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 405 Pa. Super. 24, 591 A. 2d 1079.

No. 91–7278. VALLADARES *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 800 S. W. 2d 274.

No. 91–7279. AGATI, DBA INTERNATIONAL MULTI-SERVICES *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 945 F. 2d 416.

No. 91–7283. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 943 F. 2d 24.

No. 91–7286. LAWRENCE *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1277.

No. 91–7293. BAILES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 2d 902.

No. 91–7299. SCHMITT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 590 So. 2d 404.

No. 91–7312. JORDAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1297.

No. 91–7317. QUINSKY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 888.

No. 91–7343. MARSHALL *v.* SALTON. C. A. 11th Cir. Certiorari denied. Reported below: 940 F. 2d 673.

No. 91–7365. COWAN *v.* GALLEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 943 F. 2d 48.

No. 91–7387. CARRION-CALIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 944 F. 2d 220.

No. 91–7391. STOUFFER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 817 P. 2d 1275.

No. 91–7394. IRWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 1546.

No. 91–7402. BARRIOS-BARCELONA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7405. DELGADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1159.

No. 91–7407. MASSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1490.

No. 91–7429. HINTZE *v.* SOUTHWEST GAS INC. Ct. App. Ariz. Certiorari denied.

No. 91–7433. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 356, 954 F. 2d 787.

No. 91–7436. CORN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 135.

No. 91–7440. CARR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 953 F. 2d 1392.

No. 91–7454. REYNOLDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 888.

No. 91–7464. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7465. CRANFILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1256.

No. 91–7466. SCHIMMEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 432.

No. 91-7467. CHASE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 87, 946 F. 2d 1567.

No. 91-7473. DIXON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 647.

No. 91-7479. TAYLOR *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 818 P. 2d 1030.

No. 91-7486. GOMEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1261.

No. 91-7489. ZUCKERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 91-7492. LANGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 344.

No. 91-7499. TOVAR-PAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 2d 401.

No. 91-7501. BLADE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 725.

No. 91-7513. CAHILL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 368.

No. 91-1032. SHEARSON LEHMAN MORTGAGE CORP. *v.* LAGUNA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 944 F. 2d 542.

No. 91-1198. CHESAPEAKE WESTERN RAILWAY ET AL. *v.* TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 938 F. 2d 528.

No. 91-1255. DEROBERTIS, WARDEN, ET AL. *v.* HENDERSON ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 940 F. 2d 1055.

No. 91-1282. CONNECTICUT BANK & TRUST CO. ET AL. *v.* WILMINGTON TRUST CO. ET AL. C. A. 9th Cir. Motion of Mari-

time Law Association of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 934 F. 2d 1026.

No. 91-1288. KINDIG ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

No. 91-1341. THANH VONG HOAI ET AL. *v.* THANH VAN VO ET AL. C. A. D. C. Cir. Motion of Vietnamese Community of Washington, D. C., Maryland, and Virginia for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this motion and this petition. Reported below: 290 U. S. App. D. C. 142, 935 F. 2d 308.

Rehearing Denied

No. 91-6026. WION *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 502 U. S. 1100;

No. 91-6318. CHOICE *v.* BEYER ET AL., 502 U. S. 1040;

No. 91-6388. MOORE *v.* O'MALLEY ET AL., 502 U. S. 1042; and

No. 91-6425. PAVLICO *v.* UNITED STATES, 502 U. S. 1102. Petitions for rehearing denied.

No. 91-5429. PIRON *v.* DE GROOTE ET AL., 502 U. S. 912. Petition for rehearing denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

No. 91-6802 (A-644). ANDREWS *v.* DELAND, DIRECTOR, UTAH DEPARTMENT OF CORRECTIONS, ET AL., 502 U. S. 1110. Application to suspend the effect of the order denying the petition for writ of certiorari, addressed to JUSTICE BLACKMUN and referred to the Court, denied. Petition for rehearing denied.

APRIL 4, 1992

Miscellaneous Order

No. A-735. LEWIS, DIRECTOR OF CORRECTIONS OF ARIZONA, ET AL. *v.* HARDING. Application to vacate the stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the order

staying the execution entered by the United States Court of Appeals for the Ninth Circuit on April 2, 1992, is vacated. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application.

APRIL 6, 1992

Certiorari Granted—Reversed and Remanded. (See No. 91–6751, *ante*, p. 562.)

Miscellaneous Orders

No. A–737. HARDING *v.* LEWIS, DIRECTOR OF CORRECTIONS OF ARIZONA, ET AL. Application to stay the execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–1062. IN RE DISBARMENT OF TAVOLACCI. Disbarment entered. [For earlier order herein, see 502 U. S. 1011.]

No. D–1070. IN RE DISBARMENT OF DUNN. Disbarment entered. [For earlier order herein, see 502 U. S. 1027.]

No. D–1079. IN RE DISBARMENT OF MCNAMEE. Disbarment entered. [For earlier order herein, see 502 U. S. 1055.]

No. D–1106. IN RE DISBARMENT OF HOROWITZ. It is ordered that Howard Horowitz, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1107. IN RE DISBARMENT OF CHATZ. It is ordered that Robert B. Chatz, of Northbrook, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1108. IN RE DISBARMENT OF ROSCH. It is ordered that John Franklin Rosch, of Glen Ellyn, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90–114. CONSOLIDATION COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DE-

PARTMENT OF LABOR, ET AL., 501 U. S. 680. Motion of respondent Albert C. Dayton for award of attorney's fees denied without prejudice to refiling in the United States Court of Appeals for the Fourth Circuit. JUSTICE KENNEDY and JUSTICE THOMAS took no part in the consideration or decision of this motion.

No. 91–615. ALLIED-SIGNAL, INC., AS SUCCESSOR-IN-INTEREST TO THE BENDIX CORP. *v.* DIRECTOR, DIVISION OF TAXATION. Sup. Ct. N. J. [Certiorari granted, 502 U. S. 977.] Motion of the Attorney General of Commonwealth of Virginia for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 91–719. PARKE, WARDEN *v.* RALEY. C. A. 6th Cir. [Certiorari granted, *ante*, p. 905.] Motion of petitioner to be excused from printing certain portions of the record in the joint appendix denied.

No. 91–810. CITY OF BURLINGTON *v.* DAGUE ET AL. C. A. 2d Cir. [Certiorari granted, 502 U. S. 1071.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondents for divided argument to permit American Bar Association to participate in oral argument as *amicus curiae* denied.

No. 91–913. PATTERSON, TRUSTEE *v.* SHUMATE. C. A. 4th Cir. [Certiorari granted, 502 U. S. 1057.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–998. COMMISSIONER OF INTERNAL REVENUE *v.* SOLIMAN. C. A. 4th Cir. [Certiorari granted, *ante*, p. 935.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 91–1514. ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE ET AL. *v.* STATE ADMINISTRATIVE BOARD OF ELECTION LAWS ET AL. Appeal from D. C. Md. Motion of appellants to expedite consideration of appeal denied.

No. 91–1571. MASSACHUSETTS ET AL. *v.* FRANKLIN, SECRETARY OF COMMERCE, ET AL. Appeal from D. C. Mass. Motion of appellants to expedite consideration of appeal denied. Motion of appellants to permit filings initially in typewritten form granted.

No. 91–1566. REPUBLICAN PARTY OF OREGON ET AL. *v.* KEISLING, SECRETARY OF STATE OF OREGON. C. A. 9th Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari denied.

No. 91–7344. REYNOLDS *v.* LOCAL 24, UNITED STEEL WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 27, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 91–7578. IN RE CLARKE. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 91–1135. NEWARK MORNING LEDGER CO., AS SUCCESSOR TO THE HERALD CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 945 F. 2d 555.

No. 91–1326. DISTRICT OF COLUMBIA ET AL. *v.* GREATER WASHINGTON BOARD OF TRADE. C. A. D. C. Cir. Motion of Connecticut Business & Industry Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 292 U. S. App. D. C. 209, 948 F. 2d 1317.

Certiorari Denied

No. 91–992. NEWPORT LTD. *v.* BOARD OF COMMISSIONERS, ORLEANS LEVEE DISTRICT. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 578 So. 2d 191.

No. 91–1106. TRANSAMERICA INSURANCE CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 946 F. 2d 581.

No. 91–1140. WAGNER SEED CO., INC. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 44, 946 F. 2d 918.

No. 91–1153. SPIEGEL *v.* RYAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 946 F. 2d 1435.

No. 91–1162. SID GOODMAN & CO., INC. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 945 F. 2d 398.

No. 91–1186. MONROE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 943 F. 2d 1007.

No. 91–1296. STEPHENSON *v.* OKLAHOMA TURNPIKE AUTHORITY. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1295.

No. 91–1301. GAUB *v.* RICHARD SOONG & CO. (USA), INC. C. A. 9th Cir. Certiorari denied. Reported below: 922 F. 2d 845.

No. 91–1302. MESSING *v.* MOSTOLLER, TRUSTEE. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 905.

No. 91–1308. CONTINENTAL CASUALTY CO. *v.* UNR INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 942 F. 2d 1101.

No. 91–1310. NPM GROUP, INC., FORMERLY KNOWN AS WILMAT HOLDINGS, INC. *v.* BENEDETTO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 887.

No. 91–1312. SMYTH *v.* GIPSON ET UX. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1313. NASCIMENTO *v.* STATE BAR OF MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 91–1320. HARRIS *v.* HALE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1321. BRANDON STEEL DECKS, INC. *v.* HINES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1297.

No. 91–1322. BRIGNOLI *v.* FOWLER, AS RECEIVER AND LIQUIDATING TRUSTEE OF BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 393.

No. 91–1325. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* NEW BECKLEY MINING CORP. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 1072.

No. 91–1333. MCGEE *v.* INTERINSURANCE EXCHANGE OF AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1334. LAKE COUNTRY, INC. *v.* OLSEN ET UX. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 203.

No. 91–1349. MORGENTHAU, DISTRICT ATTORNEY, NEW YORK COUNTY *v.* RANDALL. Ct. App. N. Y. Certiorari denied. Reported below: 78 N. Y. 2d 494, 583 N. E. 2d 924.

No. 91–1352. TABRIZIAN *v.* MODY ET AL. Sup. Ct. N. M. Certiorari denied.

No. 91–1400. USA MCDONALD CORP., DBA NORCO PRODUCTS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 909.

No. 91–5142. HERRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 931 F. 2d 761.

No. 91–6160. HENTHORN *v.* UNITED STATES; and LAWRENCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 930 F. 2d 920 (first case); 936 F. 2d 580 (second case).

No. 91–6282. BALAWAJDER *v.* WILLIAMS, DISTRICT COURT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 1533.

No. 91–6362. HAIDAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 2d 663.

No. 91–6374. RANSOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 940 F. 2d 286.

No. 91–6386. BAILES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 935 F. 2d 1287.

No. 91–6587. YEPMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 942 F. 2d 787.

No. 91–6934. HENRY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 324 Md. 204, 596 A. 2d 1024.

No. 91–6946. COLEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 1424.

No. 91–6957. HANUS *v.* SODORO, DALY & SODORO LAW FIRM. Sup. Ct. Neb. Certiorari denied. Reported below: 239 Neb. xxi.

No. 91–6967. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1490.

No. 91–6974. MARTIN *v.* UNITED STATES; and
No. 91–7013. HAMPTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 945 F. 2d 1387.

No. 91–6989. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 942.

No. 91–7088. GRADY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 937 F. 2d 614.

No. 91–7127. LOVE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 936 F. 2d 575.

No. 91–7186. JONES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 1106.

No. 91–7242. GEORGE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 242 Va. 264, 411 S. E. 2d 12.

No. 91–7247. WILLIAMSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 812 P. 2d 384.

No. 91–7249. CHEWNING *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 485 N. W. 2d 106.

No. 91–7250. YANKE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 588 So. 2d 4.

No. 91–7251. TYLER *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 567.

No. 91–7255. CLARK *v.* OCEAN BRAND TUNA ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–7257. TAYLOR *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 91–7258. JOHNSON *v.* CODY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1294.

No. 91–7260. FREEMAN *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 91–7262. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 201 Ill. App. 3d 440, 559 N. E. 2d 112.

No. 91–7280. LUCCHESI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 91–7282. DOESCHER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 91–7285. MITRAN *v.* COUNTY OF DUPAGE. C. A. 7th Cir. Certiorari denied. Reported below: 946 F. 2d 897.

No. 91–7287. JOHNSON, AKA RICHARDSON *v.* MONTEREY COUNTY ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7288. CARSON *v.* HERNANDEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–7294. GAMBLE *v.* WEBSTER, ATTORNEY GENERAL OF MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 91–7298. WICKLIFFE *v.* AIKEN, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 953 F. 2d 646.

No. 91–7300. DUREN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 590 So. 2d 369.

No. 91–7309. RAZO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 91–7311. ENRIGHT *v.* ROSEBUD COUNTY, MONTANA, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 250 Mont. 541, 820 P. 2d 434.

No. 91–7314. VANCE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 91–7315. YOUNG *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7332. MAISE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 394.

No. 91–7342. MORALES *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 1446, 579 N. E. 2d 491.

No. 91–7352. WEIDMAN *v.* STAHLHUT. Sup. Ct. Iowa. Certiorari denied. Reported below: 476 N. W. 2d 357.

No. 91–7367. GADSON *v.* CONCORD UNION SCHOOL DISTRICT. C. A. 1st Cir. Certiorari denied.

No. 91–7381. BOWDEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 588 So. 2d 225.

No. 91–7385. HERRERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 948 F. 2d 1046.

No. 91–7389. LEDFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1261.

No. 91–7415. POLK *v.* REYNOLDS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 91–7425. HASTINGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 400.

No. 91–7431. HOYOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 887.

No. 91–7439. DEEB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 545.

No. 91–7475. AL KASHIF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1261.

No. 91–7478. STANLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1370.

No. 91–7481. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1257.

No. 91–7488. ARNOLD *v.* KMART CORP. C. A. 7th Cir. Certiorari denied. Reported below: 946 F. 2d 897.

No. 91–7490. PAYNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 1458.

No. 91–7493. LONGBEHN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 728.

No. 91–7502. LEURO ROSAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 952 F. 2d 616.

No. 91-7503. BUBBEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91-7505. STEWART *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 588 So. 2d 972.

No. 91-7507. AJAYI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 953 F. 2d 1392.

No. 91-7510. WINN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 145.

No. 91-7512. VAN WAGNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 43.

No. 91-7518. JOSEPH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91-7519. JONES *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 950 F. 2d 731.

No. 91-7521. FREELOVE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 399.

No. 91-7526. DONAHUE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 948 F. 2d 438.

No. 91-7528. HARDIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 400.

No. 91-7534. DISMUKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91-7536. STUART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91-7538. AGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 91-7548. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410.

No. 91-7551. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 950 F. 2d 1223.

No. 91-7553. HAWKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–7559. VILLALOBOS-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 400.

No. 91–7560. ULLOA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 368.

No. 91–7565. GRANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 729.

No. 91–7570. DE LEON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 794.

No. 91–7573. MENDES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 595 A. 2d 972.

No. 91–1242. ALASKA AIRLINES, INC., ET AL. *v.* UNITED AIRLINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 948 F. 2d 536.

No. 91–1260. LAC D'AMIANTE DU QUEBEC, LTEE *v.* STANEK ET AL. Ct. App. Minn. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 474 N. W. 2d 829.

No. 91–1305. UNITED STATES *v.* GUEVARA. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 941 F. 2d 1299.

No. 91–6561. SCOTT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 229 Cal. App. 3d 707, 280 Cal. Rptr. 274.

No. 91–7308. MILES *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner to supplement the record denied. Certiorari denied.

Rehearing Denied

No. 91–6400. WILLIAMS ET UX. *v.* UNITED STATES, 502 U. S. 1042;

No. 91–6667. RESTREPO ET UX. *v.* UNITED STATES SMALL BUSINESS ADMINISTRATION, 502 U. S. 1080;

No. 91–6868. FLEMING *v.* COLORADO, 502 U. S. 1113;

No. 91–6893. DEMPSEY *v.* MASSACHUSETTS, 502 U. S. 1114; and

No. 91–7124. BORCHERS *v.* UNITED STATES ET AL., 502 U. S. 1120. Petitions for rehearing denied.

APRIL 7, 1992

Dismissal Under Rule 46

No. 91–497. MICHIGAN EMPLOYMENT SECURITY COMMISSION *v.* WOLVERINE RADIO CO., INC. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 930 F. 2d 1132.

APRIL 15, 1992

Dismissal Under Rule 46

No. 91–1359. PECHINEY & TREFIMETAUX *v.* GOULD, INC. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 947 F. 2d 218.

APRIL 20, 1992

Certiorari Granted—Vacated and Remanded

No. 89–1681. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS *v.* BROWN ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Freeman* v. *Pitts*, *ante*, p. 467, and *Board of Ed. of Oklahoma City Pub. Schools* v. *Dowell*, 498 U. S. 237 (1991). Reported below: 892 F. 2d 851.

No. 90–1527. UNITED STATES *v.* CALDERONE ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Felix*, *ante*, p. 378. Reported below: 917 F. 2d 717.

No. 91–31. UNITED STATES *v.* GAMBINO. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Felix*, *ante*, p. 378. Reported below: 920 F. 2d 1108.

No. 91–900. CASPARI ET AL. *v.* MCINTYRE, DIRECTOR, MISSOURI DIVISION OF CLASSIFICATION AND TREATMENT. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Felix*, *ante*, p. 378. Reported below: 938 F. 2d 899.

No. 91–1340. DENNLER ET AL. *v.* TRIPPET ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded

for further consideration in light of § 27 of the Securities Exchange Act of 1934, 48 Stat. 902, as amended, 15 U. S. C. § 78aa. JUSTICE THOMAS took no part in the consideration or decision of this case.* Reported below: 939 F. 2d 1420 and 947 F. 2d 897.

Miscellaneous Orders

No. ———. CARROLL ET AL. *v.* UNITED STATES. Motion to direct the Clerk to file petition that does not conform with the Rules of this Court denied.

No. ———. JOHN *v.* NORTH COMMUNITY BANK ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. ———. SCHMIDT *v.* SCHMIDT. Motion to dispense with printing petition for writ of certiorari denied.

No. A–693 (91–1618). VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* QUILTER, SPEAKER PRO TEMPORE OF OHIO HOUSE OF REPRESENTATIVES, ET AL. Appeal from D. C. N. D. Ohio. Application to stay an order of the United States District Court for the Northern District of Ohio, filed March 17, 1992, and supplemented April 6, 1992, presented to JUSTICE STEVENS, and by him referred to the Court, granted, and it is ordered that the orders of the United States District Court for the Northern District of Ohio, case No. 5:91 CV 2219, entered March 10, 1992, and March 31, 1992, are stayed pending final disposition of the appeal by this Court.

No. A–702. FREAS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–718. GAYDOS *v.* GAYDOS ET AL. C. A. 3d Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–1078. IN RE DISBARMENT OF BEHRENDT. Disbarment entered. [For earlier order herein, see 502 U. S. 1055.]

No. D–1081. IN RE DISBARMENT OF STELLA. Disbarment entered. [For earlier order herein, see 502 U. S. 1087.]

---

*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 1003.]

No. D–1082. IN RE DISBARMENT OF SOLODKY. Disbarment entered. [For earlier order herein, see 502 U. S. 1087.]

No. D–1083. IN RE DISBARMENT OF GATTSEK. Disbarment entered. [For earlier order herein, see 502 U. S. 1087.]

No. D–1109. IN RE DISBARMENT OF PRESNICK. It is ordered that Daniel V. Presnick, of Orange, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1110. IN RE DISBARMENT OF HANSEN. It is ordered that Phil L. Hansen, of Salt Lake City, Utah, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1111. IN RE DISBARMENT OF TESSLER. It is ordered that Harvey Tessler, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1112. IN RE DISBARMENT OF WHITE. It is ordered that Ivan Vance White, Jr., of Wilmington, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1113. IN RE DISBARMENT OF DAVIS. It is ordered that Hilton Davis, of Newark, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1114. IN RE DISBARMENT OF HARRISON. It is ordered that Gladys E. Harrison, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1115. IN RE DISBARMENT OF D'ALBORA. It is ordered that John B. D'Albora, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Sixth motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $233,144.11. Assessment of this award is deferred pending receipt of further responses by Colorado and the *amici curiae* to the special assessment proposed by the Special Master, to be filed on or before Monday, May 4, 1992, and further order of the Court. [For earlier order herein, see, *e. g.*, *ante*, p. 917.]

No. 91–744. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. *v.* CASEY, GOVERNOR OF PENNYSLVANIA, ET AL.; and

No. 91–902. CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 502 U. S. 1056.] Motions of James J. Crook and America 21, Family Values for the Twenty-First Century for leave to file briefs as *amici curiae* denied. Motion of Arlen Specter to join *amici curiae* brief of Don Edwards et al. granted.

No. 91–913. PATTERSON, TRUSTEE *v.* SHUMATE. C. A. 4th Cir. [Certiorari granted, 502 U. S. 1057.] Motions for leave to file briefs as *amici curiae* filed by the following are granted: Hallmark Cards, Inc., Wal-Mart Stores et al., Eldon S. Reed, Ronald J. Wyles et al., ERISA Industry Committee et al., Lincoln National Corp., American Society of Pension Actuaries, Chamber of Commerce of the United States of America, and American College of Trust and Estate Counsel.

No. 91–1208. DRILAKE FARMS, INC., ET AL. *v.* SURRILLO ET AL. Sup. Ct. App. W. Va.; and

No. 91–1353. CONROY *v.* ANISKOFF ET AL. Sup. Jud. Ct. Me. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 91–1502. FRANKLIN, SECRETARY OF COMMERCE, ET AL. *v.* MASSACHUSETTS ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 929.] Motion of Attorney General of Washington for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 91–6854. INGALLS *v.* ROOSEVELT COUNTY, NEW MEXICO, ET AL. Sup. Ct. N. M. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [502 U. S. 1089] denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant this motion.

No. 91–7325. DEMOS *v.* SUPREME COURT OF WASHINGTON ET AL. Sup. Ct. Wash.; and

No. 91–7376. MCDONALD *v.* YELLOW CAB METRO, INC., ET AL. Sup. Ct. Tenn. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until May 11, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court. JUSTICE STEVENS would deny the petitions for writs of certiorari.

No. 91–7377. MOOYMAN *v.* WORKMEN'S COMPENSATION APPEAL BOARD ET AL. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 11, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 91–7504. DAS *v.* A. W. CHESTERTON CO. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 11, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 91–7052. IN RE DAVIS;

No. 91–7117. IN RE ANDERSON;

No. 91–7263. IN RE JARVI;

No. 91–7264. IN RE JARVI;

No. 91–7452. IN RE PREUSS;

No. 91–7517. IN RE HARRISON; and

No. 91–7626. IN RE BURDINE. Petitions for writs of mandamus denied.

No. 91–7006. IN RE ELLIOTT. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 91–1030. WITHROW *v.* WILLIAMS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 944 F. 2d 284.

Certiorari Denied

No. 90–1801. BOSTON TEACHERS UNION LOCAL 66 *v.* MORGAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 926 F. 2d 86.

No. 90–1824. PALOMAR MOBILEHOME PARK ASSN. *v.* CITY OF SAN MARCOS, CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–8394. MUNERA-CADAVID *v.* UNITED STATES (two cases). C. A. 11th Cir. Certiorari denied. Reported below: 932 F. 2d 976.

No. 91–631. CASELLA ET AL. *v.* CITY OF MORGAN HILL. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 230 Cal. App. 3d 43, 280 Cal. Rptr. 876.

No. 91–934. LADNER *v.* SMITH, SHERIFF, SMITH COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 2d 356.

No. 91–987. CITY AND COUNTY OF SAN FRANCISCO ET AL. *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 1391.

No. 91–1014. LACHTERMAN *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 812 S. W. 2d 759.

No. 91–1125. ARNOLDT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 1120.

No. 91–1145. CAMPBELL *v.* DONDERO ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 107 Nev. 1115, 838 P. 2d 936.

No. 91–1161. KISER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 948 F. 2d 418.

No. 91–1177. CZARNESKI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 1534.

No. 91–1179. PUEBLO OF SANTO DOMINGO *v.* THOMPSON ET AL.; and

No. 91–1346. UNITED STATES *v.* THOMPSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 941 F. 2d 1074.

No. 91–1183. RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 945 F. 2d 765.

No. 91–1193. NEW BERLIN GRADING CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 946 F. 2d 527.

No. 91–1203. HEWLETT-PACKARD CO. *v.* DATAGATE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 941 F. 2d 864.

No. 91–1209. NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION ET AL. *v.* FOUST ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 942 F. 2d 712.

No. 91–1213. FLYNT ET AL. *v.* SPENCE ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 816 P. 2d 771.

No. 91–1217. FRATERNAL ORDER OF POLICE, LODGE NO. 5 *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 935.

No. 91–1218. FAIRCHILD ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 937 F. 2d 612.

No. 91–1225. MIDNIGHT SESSIONS, LTD., T/A AFTER MIDNIGHT, ET AL. *v.* CITY OF PHILADELPHIA. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 2d 667.

No. 91–1227. DONNER *v.* APPALACHIAN INSURANCE CO. ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 580 So. 2d 797.

No. 91–1241. SHIMOTA ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 943 F. 2d 1312.

No. 91–1243. MCDONALD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 939 F. 2d 916.

No. 91–1254. GEORGE JAMES PLATSIS, P. C. *v.* E. F. HUTTON & CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 38.

No. 91–1259. LITTON MICROWAVE COOKING PRODUCTS, DIVISION OF LITTON SYSTEMS, INC., PREDECESSOR TO MICROWAVE PRODUCTS OF AMERICA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 949 F. 2d 249.

No. 91–1285. COLORADO LIBERTARIAN PARTY ET AL. *v.* MEYER, SECRETARY OF STATE OF COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 817 P. 2d 998.

No. 91–1327. HOLDINESS *v.* CSX TRANSPORTATION, INC. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1281.

No. 91–1342. CONSOLIDATED BEEF INDUSTRIES, INC., INDIVIDUALLY AND AS A FIDUCIARY UNDER THE C. B. I., INC., PENSION PLAN *v.* NEW YORK LIFE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 949 F. 2d 960.

No. 91–1345. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 950 F. 2d 1401.

No. 91–1348. MADISON CABLEVISION, INC. *v.* CITY OF MORGANTOWN, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1281.

No. 91–1361. DELTA HOLDINGS, INC. *v.* NATIONAL DISTILLERS & CHEMICAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 945 F. 2d 1226.

No. 91–1362. CITY OF PHILADELPHIA ET AL. *v.* SIMMONS, ADMINISTRATRIX OF THE ESTATE OF SIMMONS. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 1042.

No. 91–1365. WESLEY *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 140 Pa. Commw. 428, 593 A. 2d 28.

No. 91–1381. BIRSNER ET AL. *v.* SIVALIGNHAM ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1390. WEST FARMS ASSOCIATES *v.* STATE TRAFFIC COMMISSION OF CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 951 F. 2d 469.

No. 91–1392. HOMEBUILDERS ASSOCIATION OF BUCKS/MONTGOMERY COUNTIES, INC., ET AL. *v.* BOROUGH OF TRAPPE. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 722.

No. 91–1397. CITY OF TUKWILA *v.* WORLD WIDE VIDEO, INC. Sup. Ct. Wash. Certiorari denied. Reported below: 117 Wash. 2d 382, 816 P. 2d 18.

No. 91–1405. OPTIMAL DATA CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 950 F. 2d 730.

No. 91–1407. WHITE BUFFALO CONSTRUCTION, INC. *v.* J. ARLIE BRYANT, INC. C. A. 9th Cir. Certiorari denied. Reported below: 935 F. 2d 277.

No. 91–1408. CHAGALL *v.* SOBEL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1409. HERMAN, WARDEN, ET AL. *v.* PAGE. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 793.

No. 91–1411. WHOLESALE & RETAIL FOOD DISTRIBUTION LOCAL 63, INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* BENDER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 358.

No. 91–1413. THOMPSON *v.* CITY OF COVINGTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 896.

No. 91–1414. EVONUK *v.* SHEKELL ET AL. Ct. App. Ore. Certiorari denied. Reported below: 108 Ore. App. 194, 813 P. 2d 1140.

No. 91–1448. PUTKA *v.* FIRST CATHOLIC SLOVAK UNION OF THE UNITED STATES AND CANADA ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 75 Ohio App. 3d 741, 600 N. E. 2d 797.

No. 91–1453. HOANG *v.* SIMS ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–1454. VILLA MARINA YACHT SALES, INC., ET AL. *v.* HATTERAS YACHT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 947 F. 2d 529.

No. 91–1457. PIOTROWSKI ET AL. *v.* CITY OF CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 215 Ill. App. 3d 829, 576 N. E. 2d 64.

No. 91–1465. PATEL *v.* MILGRAM. Super. Ct. Pa. Certiorari denied. Reported below: 408 Pa. Super. 639, 585 A. 2d 542.

No. 91–1466. MIRABAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–1468. GRABLE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 896.

No. 91–1476. REBER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 961.

No. 91–1477. NORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1259.

No. 91–1488. RUSS ET UX. *v.* INTERNATIONAL PAPER CO. C. A. 5th Cir. Certiorari denied. Reported below: 943 F. 2d 589.

No. 91–1500. SHRIVER *v.* GAF CORP. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 723.

No. 91–1508. MARKET/MEDIA RESEARCH, INC. *v.* CUYAHOGA COUNTY COURT OF COMMON PLEAS ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 1438, 579 N. E. 2d 211.

No. 91–5025. RIVERA-FELICIANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 930 F. 2d 951.

No. 91–6465. HILLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 794.

No. 91–6524. CAREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 44.

No. 91–6560. COX *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 585 So. 2d 182.

No. 91–6616. SAMUELS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 53.

No. 91–6659. KINDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 362.

No. 91–6709. SHEPHERD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 935 F. 2d 1288.

No. 91–6717. BENAVIDES *v.* DIAZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 933 F. 2d 1004.

No. 91–6775. BERKI, AKA BERKOWITZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 936 F. 2d 529.

No. 91–6988. CURRY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 568.

No. 91–6997. ALDRIDGE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 91–7015. FAULS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 887.

No. 91–7025. RANDLE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 91–7054. TAYLOR *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 933 F. 2d 325.

No. 91–7072. SALAMI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 949 F. 2d 68.

No. 91–7081. REESE *v.* FULCOMER, DEPUTY COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. C. A. 3d Cir. Certiorari denied. Reported below: 946 F. 2d 247.

No. 91–7113. BICKETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 53.

No. 91–7128. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 938 F. 2d 162.

No. 91–7143. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 291 U. S. App. D. C. 84, 938 F. 2d 1343.

No. 91–7159. MICKLE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 3d 140, 814 P. 2d 290.

No. 91–7174. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 954 F. 2d 199.

No. 91–7185. JEFFRESS *v.* PETERSON, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 941.

No. 91–7188. SHORT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 1445.

No. 91–7197. LUCAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 1253.

No. 91–7244. FAULKNER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 528 Pa. 57, 595 A. 2d 28.

No. 91–7302. TUGGLE *v.* BAIR, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 91–7320. CALDWELL *v.* DRISCOLL ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7326. TAYLOR *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 91–7327. AGOMO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 344.

No. 91–7333. CIDLOWSKI *v.* OFFICE OF THE SECRETARY OF STATE OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 91–7336. JONES *v.* DEPARTMENT STORE EMPLOYEES UNION LOCAL 1100 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 908.

No. 91–7339. GREEN *v.* JONES, SUPERINTENDENT, DERMOTT SCHOOLS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 728.

No. 91–7345. RANKINS *v.* WEISENBURGER. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 407.

No. 91–7347. SKELTON *v.* PRI-COR, INC. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1290.

No. 91–7350. BROWN *v.* STAINER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 91–7354. MOLINA *v.* STICKRATH. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 905.

No. 91–7355. LARNER *v.* WYMAN. Ct. App. Ind. Certiorari denied. Reported below: 568 N. E. 2d 1059.

No. 91–7360. YATES *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–7366. JOHNSON *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 949 F. 2d 394.

No. 91–7371. CRAWFORD *v.* DISTRICT OF COLUMBIA BOARD OF PAROLE. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 56, 951 F. 2d 1323.

No. 91–7378. PATTERSON *v.* BUTLER ET AL. Sup. Ct. Ga. Certiorari denied.

No. 91–7379. BRENNAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7380. CALDWELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 818 S. W. 2d 790.

No. 91–7383. WILLIAMS *v.* LOUISIANA STATE PENITENTIARY. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 583 So. 2d 1249.

No. 91–7384. DOERR *v.* EMERSON. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–7392. DOMBY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7395. HUCKLEBERRY *v.* GUNTER, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 946 F. 2d 901.

No. 91–7398. CARSON *v.* PETERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–7400. FUNKHOUSER *v.* SAFFLE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1294.

No. 91–7401. HERBAGE *v.* CARLSON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 727.

No. 91–7404. NANCY B. *v.* CHARLOTTE M. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 232 Cal. App. 3d 1239, 284 Cal. Rptr. 18.

No. 91–7406. CURTIS *v.* CURTIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–7410. LOCK *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 567 N. E. 2d 1155.

No. 91–7411. REES *v.* REYES. Ct. App. D. C. Certiorari denied. Reported below: 602 A. 2d 1137.

No. 91–7412. RAMSEY *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 728.

No. 91–7413. MALUMPHY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 91–7414. PRUNTY *v.* BAKER ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–7416. MCCULLOUGH *v.* KERSH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1256.

No. 91–7417. BALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 947.

No. 91–7419. MCCULLOUGH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 91–7420. SHACKELFORD *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 521.

No. 91–7421. WESTBROOK *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7423. KERR *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 91–7424. GIBBS *v.* CLEMENTS FOOD CO. C. A. 10th Cir. Certiorari denied. Reported below: 946 F. 2d 901.

No. 91–7432. SIMMONS *v.* SIMMONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–7434. SNYDER *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 726.

No. 91–7435. SMITH *v.* BUNNELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 407.

No. 91–7438. DE NARDO *v.* ANCHORAGE. Ct. App. Alaska. Certiorari denied.

No. 91–7441. STEPHEN ET AL. *v.* CALIFORNIA STATE BANK ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–7442. GRANT *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 91–7443. JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 651.

No. 91–7444. HOLLIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 91–7445. DUNN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 817 S. W. 2d 241.

No. 91–7446. STANLEY *v.* RED RIVER FEDERAL CREDIT UNION. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 567.

No. 91–7447. VERTIN *v.* OVERTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–7453. WRENN *v.* CLARK. Cir. Ct., Jefferson County, Ala. Certiorari denied.

No. 91–7455. SOLIS *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 91–7456. ROMULUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 949 F. 2d 713.

No. 91–7457. WILLIAMS *v.* UNIVERSITY OF MISSISSIPPI MEDICAL CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1486.

No. 91–7474. JOHNSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 306 S. C. 119, 410 S. E. 2d 547.

No. 91–7480. ELFREEZE *v.* NEAL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–7495. ROMERO *v.* CALDWELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 954.

No. 91–7496. MABERY *v.* RODRIGUEZ ET AL. C. A. 2d Cir. Certiorari denied.

No. 91–7498. LASALLE *v.* WARDEN, OSSINING FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 1.

No. 91–7509. BALSAMO *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1391.

No. 91–7514. PARKER *v.* OKLAHOMA CITY POLICE DEPARTMENT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 954.

No. 91–7515. POPE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 91–7524. FRANCOIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397.

No. 91–7532. MEYER *v.* MEYER (two cases). Sup. Ct. Fla. Certiorari denied. Reported below: 592 So. 2d 681 (first case); 595 So. 2d 557 (second case).

No. 91–7533. MERRIMAN ET AL. *v.* BOSSIER PARISH SHERIFF'S DEPARTMENT ET AL.; and

No. 91–7535. SHUBBIE ET AL. *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: No. 91–7533, 947 F. 2d 1487.

No. 91–7547. VAN WOUNDENBERG *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 818 P. 2d 913.

No. 91–7549. PASCHAL *v.* LAMBDIN, SUPERINTENDENT, GLADES CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 368.

No. 91–7554. HUGHES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397.

No. 91–7577. DONNELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1283.

No. 91–7584. CURTIUS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 951 F. 2d 1267.

No. 91–7587. HAYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 707.

No. 91–7590. CUERVO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1278.

No. 91–7591. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397.

No. 91–7592. HENSHAW *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1259.

No. 91–7594. WATSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 982.

No. 91–7596. KOONCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 945 F. 2d 1145.

No. 91–7605. ABREU *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 952 F. 2d 1458.

No. 91–7606. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 345.

No. 91–7608. MEYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 2d 914.

No. 91–7609. MARTINEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 951 F. 2d 887.

No. 91–7613. GOLDSTEIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–7615. CASTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 635.

No. 91–7617. CAMPAGNA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–7623. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–7627. BURDINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1283.

No. 91–7628. EICOFF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1162.

No. 91–7631. AUDINOT ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–7633. DELGADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1159.

No. 91–7637. DAVENPORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 2d 404.

No. 91–7639. WHARTON *v.* CITY OF VENUS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 891.

No. 91–7642. BAGGULEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 264, 953 F. 2d 660.

No. 91–7643. LANGSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 770.

No. 91–7644. MINNICK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 949 F. 2d 8.

No. 91–7645. MOLINA-CUARTAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 345.

No. 91–7646. RAGONESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–7647. MCINTOSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91–7648. ANDERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 635.

No. 91–7649. BUSTAMENTE, AKA LUNA-PERALTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–7650. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91–7651. MATEO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1389.

No. 91–7655. LLOYD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 1383.

No. 91–7661. REED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 97.

No. 91–7662. HALFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 948 F. 2d 1054.

No. 91–7664. TUCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 398.

No. 91–7667. CHRISTOFFEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1086.

No. 91–7668. TOLLIVER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 1309.

No. 91–7680. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 45.

No. 91–7682. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 122.

No. 91–7685. CONNOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397.

No. 91–7691. FLYNN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 928.

No. 91–7692. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1227.

No. 91–7696. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1261.

No. 91–7698. ELLIOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1261.

No. 91–7711. BURSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 1196.

No. 91–7717. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1256.

No. 91–7720. DELEGAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 91–7721. NEWBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 281.

No. 91–7722. LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–7723. MACKEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91–7743. HENRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 933 F. 2d 553.

No. 91–7744. YANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 91–7745. DEFUSCO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 949 F. 2d 114.

No. 91–7746. CHASMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 50.

No. 91–569. WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF COLVILLE RESERVATION ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 938 F. 2d 146.

No. 91–6385. ST. GERMAINE *v.* CIRCUIT COURT FOR VILAS COUNTY. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 938 F. 2d 75.

No. 91–859. UNITED STATES DEPARTMENT OF COMMERCE ET AL. *v.* MONTANA ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 91–1136. RAUTENBERG ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th

Cir. Motion of petitioners for leave to file an unredacted petition for writ of certiorari under seal granted. Motion of the Solicitor General for leave to file a brief in opposition initially under seal and to lift seal on brief in opposition and on the prior filing granted. Motion of petitioners for leave to file a reply brief and addendum to reply brief under seal granted, and the seal is lifted. Motion of petitioners to file motion to take judicial notice under seal granted. The seal is lifted, and the motion to take judicial notice is granted. Certiorari denied.

No. 91–1221. UNITED STATES *v.* KOONCE. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 945 F. 2d 1145.

No. 91–1239. TEXAS *v.* COOK. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 821 S. W. 2d 600.

No. 91–1289. OHIO *v.* MILLER. Ct. App. Ohio, Summit County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 91–1316. COLORADO *v.* MARCELLUS. Ct. App. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 819 P. 2d 555.

No. 91–1351. ARIZONA *v.* TAYLOR. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 167 Ariz. 439, 808 P. 2d 324.

No. 91–1356. BENFIELD *v.* SAUL ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 947 F. 2d 940.

No. 91–1530. BRADLEY ET AL. *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 952 F. 2d 1391.

No. 91–1458. WHEELER *v.* BUILDING GRIEVANCE COMMITTEE OF CITY OF O'FALLON, ILLINOIS, ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

No. 91–7179. SCOTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 956 F. 2d 1159.

Rehearing Denied

No. 91-898. IN RE WELT, 502 U. S. 1028;

No. 91-1096. COBIN ET AL. *v.* CASTLEBERRY, CO-EXECUTOR OF ESTATE OF CASTLEBERRY, DECEASED, ET AL., 502 U. S. 1099;

No. 91-6267. BARNES *v.* FIRST NATIONAL BANK ET AL., 502 U. S. 1101;

No. 91-6296. JACOBS *v.* SUPREME COURT OF MISSOURI, *ante*, p. 920;

No. 91-6361. GIBSON *v.* GEORGIA, 502 U. S. 1101;

No. 91-6377. WILLIAMS *v.* UNITED STATES, 502 U. S. 1101;

No. 91-6455. WILLIAMS *v.* UNITED STATES, 502 U. S. 1101;

No. 91-6541. WILLIAMS *v.* GEORGIA, 502 U. S. 1103;

No. 91-6603. O'CONNOR ET UX. *v.* UNITED STATES, 502 U. S. 1104;

No. 91-6621. BRANCH *v.* UNITED STATES, 502 U. S. 1104;

No. 91-6630. BLEGEN *v.* UNITED TRUCK MAINTENANCE ET AL., 502 U. S. 1079;

No. 91-6639. CULLUM *v.* UNITED STATES, 502 U. S. 1104;

No. 91-6640. BROWN *v.* ILLINOIS, 502 U. S. 1104;

No. 91-6674. YOUNG *v.* FLORIDA, 502 U. S. 1105;

No. 91-6741. JONES *v.* PUCKETT, WARDEN, 502 U. S. 1107;

No. 91-6747. MORRIS *v.* UNIVERSITY OF ARKANSAS ET AL., 502 U. S. 1108;

No. 91-6755. PECORARO *v.* ILLINOIS, 502 U. S. 1108;

No. 91-6813. JOHNSON *v.* MICHIGAN, 502 U. S. 1111;

No. 91-6818. COLEMAN *v.* KOPF ET AL., 502 U. S. 1111;

No. 91-6821. IN RE ANDERSON, *ante*, p. 918;

No. 91-6852. FITZGERALD *v.* THOMPSON, WARDEN, 502 U. S. 1112;

No. 91-6907. MILLER *v.* DIGGS, 502 U. S. 1115;

No. 91-6920. LAUREANO *v.* SULLIVAN, SUPERINTENDENT, OSSINING CORRECTIONAL FACILITY, ET AL., 502 U. S. 1116;

No. 91-6945. BAHR *v.* DEPARTMENT OF THE ARMY, *ante*, p. 909;

No. 91-6973. JACKSON ET AL. *v.* DIXON-BOOKMAN ET AL., 502 U. S. 1117;

No. 91-6981. WESLEY *v.* REDMAN ET AL., *ante*, p. 910;

No. 91-6996. SHUMATE *v.* CREASY, 502 U. S. 1118;

No. 91-7000. SUN *v.* FORRESTER, *ante*, p. 921;

No. 91-7001. SWINICK *v.* NEW JERSEY, 502 U. S. 1118;

No. 91-7019. MONTGOMERY *v.* CLARK, WARDEN, 502 U. S. 1118;

No. 91–7023. RUB ET AL. *v.* PRODUCTION CREDIT ASSOCIATION OF MANDAN, 502 U. S. 1118; and

No. 91–7024. RUB ET AL. *v.* ADOLPH RUB TRUST ET AL., *ante*, p. 911. Petitions for rehearing denied.

No. 90–7628. MEGAR *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 502 U. S. 825. Petition for rehearing denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

No. 91–6653. SALEEM *v.* 3–M CO., 502 U. S. 1124. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

APRIL 21, 1992

Miscellaneous Orders. (See also No. A–767, *ante*, p. 653.)

No. A–766. VASQUEZ, WARDEN *v.* HARRIS. Application to vacate the stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the order staying the execution entered by the United States Court of Appeals for the Ninth Circuit in No. 92–55426 on April 20, 1992, is vacated.

No. A–768. VASQUEZ, WARDEN *v.* HARRIS. Application to vacate the stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the order staying the execution entered by the United States Court of Appeals for the Ninth Circuit on April 21, 1992, is vacated. No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application.

APRIL 22, 1992

Miscellaneous Order

No. A–775. MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* HAITIAN CENTERS COUNCIL, INC., ET AL. Application for stay of preliminary injunction, presented to JUSTICE THOMAS, and by him referred to the Court, granted, and it is ordered that the preliminary injunction entered on April 6, 1992, and clarified on April 15, 1992, by the United

States District Court for the Eastern District of New York, case No. 92 CV 1258, is stayed pending disposition of the appeal by the United States Court of Appeals for the Second Circuit. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER joins, dissenting.

I would deny the Government's application to lift the injunction to the extent it applies to refugees who are and who remain screened in. Insofar as it prevents repatriation of those the Government determines may not remain, I would lift the injunction.

Certiorari Denied

No. 91–8028 (A–780). WHITE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution. Reported below: 959 F. 2d 1319.

APRIL 27, 1992

Certiorari Granted—Vacated and Remanded

No. 91–1075. BAILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to remand the case to the United States District Court for the Northern District of Alabama with instructions to vacate with prejudice that aspect of the District Court's award that represents the "doubling" of damages as suggested by the Solicitor General in his brief for the United States filed April 1, 1992, and for further appropriate proceedings. Reported below: 942 F. 2d 1555.

Miscellaneous Orders

No. ———. HALAS *v.* QUIGG. Motion of petitioner for reconsideration of order denying motion to direct the Clerk to file petition for writ of certiorari out of time [*ante*, p. 955] denied.

No. D–1087. IN RE DISBARMENT OF FOX. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–1088. IN RE DISBARMENT OF KRAMER. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–1116. IN RE DISBARMENT OF MULDROW. It is ordered that Norris Muldrow, of Cincinnati, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. It is ordered that the Honorable Vincent L. McKusick, retired Chief Justice, Supreme Judicial Court of Maine, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. JUSTICE SOUTER took no part in the consideration or decision of this order. [For earlier order herein, see 502 U. S. 1069.]

No. 91–321. ITEL CONTAINERS INTERNATIONAL CORP. *v.* HUDDLESTON, COMMISSIONER OF REVENUE OF TENNESSEE. Sup. Ct. Tenn. [Certiorari granted, 502 U. S. 1090.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 91–1010. PUERTO RICO AQUEDUCT AND SEWER AUTHORITY *v.* METCALF & EDDY, INC. C. A. 1st Cir. [Certiorari granted, *ante*, p. 918.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 91–615. ALLIED-SIGNAL, INC., AS SUCCESSOR-IN-INTEREST TO THE BENDIX CORP. *v.* DIRECTOR, DIVISION OF TAXATION. Sup. Ct. N. J. [Certiorari granted, 502 U. S. 977.] Motion of respondent to strike *amici curiae* brief of General Motors Corp. et al. denied. Motion of respondent to strike *amicus curiae* brief of Georgia Coalition of Military Federal Retirees, Inc., granted.

No. 91–990. FARRAR ET AL., COADMINISTRATORS OF ESTATE OF FARRAR, DECEASED *v.* HOBBY. C. A. 5th Cir. [Certiorari granted, 502 U. S. 1090.] Motion of American Bar Association for leave to file a brief as *amicus curiae* granted.

No. 91–1188. ROWLAND, FORMER DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNCIL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 905.] Further consideration of motion of respondent for leave to proceed further herein *in forma pauperis* deferred to hearing of case on the merits. The Clerk is directed to print respondent's brief on the merits.

No. 91–1326. DISTRICT OF COLUMBIA ET AL. *v.* GREATER WASHINGTON BOARD OF TRADE. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 970.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 91–1340. DENNLER ET AL. *v.* TRIPPET ET AL. C. A. 10th Cir. The order entered April 20, 1992 [*ante*, p. 978], is amended to read as follows: Certiorari granted, judgment vacated, and case remanded for further consideration in light of § 27A of the Securities Exchange Act of 1934, as added, 105 Stat. 2387, 15 U. S. C. § 78aa–1 (1988 ed., Supp. III). JUSTICE THOMAS took no part in the consideration or decision of this case.

No. 91–1423. RAILROAD COMMISSION OF TEXAS ET AL. *v.* MISSOURI PACIFIC RAILROAD ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 91–7403. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until May 18, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 91–7540. CALHOUN *v.* UNITED STATES ET AL. C. A. 2d Cir.; and

No. 91–7550. LOPEZ *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until

May 18, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

No. 91–7151. IN RE DE'ALBUQUERQUE;
No. 91–7826. IN RE DEPEW; and
No. 91–7833. IN RE QUIRKE. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 91–1421. UNITED STATES *v.* HILL ET UX. C. A. Fed. Cir. Certiorari granted. Reported below: 945 F. 2d 1529.

No. 91–1231. UNITED STATES *v.* DIXON ET AL. Ct. App. D. C. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 598 A. 2d 724.

Certiorari Denied

No. 91–1085. CHESTMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 947 F. 2d 551.

No. 91–1152. PUBLIC UTILITY DISTRICT NO. 1, DOUGLAS COUNTY, WASHINGTON *v.* BONNEVILLE POWER ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 386.

No. 91–1234. RICHARDS *v.* LIBERTY MUTUAL FIRE INSURANCE CO. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 810 S. W. 2d 232.

No. 91–1265. BELHUMEUR ET AL. *v.* MASSACHUSETTS EDUCATION ASSN. ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 411 Mass. 142, 580 N. E. 2d 746.

No. 91–1267. B. J. ALAN CO., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 91–1281. POPKIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1535.

No. 91–1286. SANGRE DE CRISTO DEVELOPMENT CO., INC., ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 932 F. 2d 891.

No. 91–1344. KIDWELL ET AL. *v.* TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 283.

No. 91–1375. GOLDBLUM *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 722.

No. 91–1377. YING SHEN *v.* OKLAHOMA STATE DEPARTMENT OF HEALTH. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 955.

No. 91–1384. UNION OIL COMPANY OF CALIFORNIA *v.* BATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 647.

No. 91–1385. UNION OIL COMPANY OF CALIFORNIA *v.* HAMILTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 908.

No. 91–1391. PATTON *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 91–1401. BOUCHARD ET AL. *v.* REGIONAL GOVERNING BOARD OF REGION V MENTAL RETARDATION SERVICES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 939 F. 2d 1323.

No. 91–1402. BROIDA *v.* SMITH ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 579 So. 2d 141.

No. 91–1403. EATHERLY ET UX. *v.* SMITH COUNTY, TENNESSEE. Ct. App. Tenn. Certiorari denied. Reported below: 820 S. W. 2d 366.

No. 91–1406. AMERICAN TRAIN DISPATCHERS ASSN. *v.* NORFOLK SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 887.

No. 91–1424. HONG KONG ISLANDS LINE AMERICA, S. A. *v.* C-ART, LTD. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 530.

No. 91–1427. KLINEBURGER *v.* MARITRANS OPERATING PARTNERS L. P. ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 404 Pa. Super. 490, 591 A. 2d 314.

No. 91–1428. MIDDLETON *v.* CROWLEY TOWING & TRANSPORTATION, INC. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 1285.

No. 91–1429. KRASNIQI *v.* DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 809 S. W. 2d 927.

No. 91–1431. BARGER ET AL. *v.* COURIER JOURNAL & LOUISVILLE TIMES CO. ET AL. Ct. App. Ky. Certiorari denied.

No. 91–1435. RICH *v.* ACTION S. A. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 951 F. 2d 504.

No. 91–1439. SCHALK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 823 S. W. 2d 633.

No. 91–1444. UTESCH ET AL. *v.* DITTMER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 947 F. 2d 321.

No. 91–1445. ADAMICK ET AL. *v.* AMEX ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–1455. ALLEN *v.* LOUISIANA STATE BOARD OF DENTISTRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 946.

No. 91–1456. UBEROI *v.* UNIVERSITY OF COLORADO BOARD OF REGENTS ET AL. Ct. App. Colo. Certiorari denied.

No. 91–5990. BERNARDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 932 F. 2d 957.

No. 91–6758. PERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1490.

No. 91–6809. GROSECLOSE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 91–6810. GROSECLOSE *v.* MCWILLIAMS, EXECUTIVE SECRETARY OF THE TENNESSEE SUPREME COURT. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 51.

No. 91–7010. WALLS *v.* COOPER ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 604 A. 2d 419.

No. 91–7176. WIGGINS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 324 Md. 551, 597 A. 2d 1359.

No. 91–7187. DORESTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 942.

No. 91–7272. BOWERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 944 F. 2d 801.

No. 91–7277. DEGIOVANNI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 393.

No. 91–7427. HENDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–7450. RUBIANO-MARTINEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 2d 397.

No. 91–7460. COVINO *v.* CASHMAN. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1159.

No. 91–7461. CROSBY *v.* WALDNER. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 91–7468. ASHBA *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 580 N. E. 2d 244.

No. 91–7471. CROSLAND *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 395.

No. 91–7482. GOLDEN *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 944.

No. 91–7485. GARRISON *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 949 F. 2d 401.

No. 91–7487. ELGIN *v.* BUNNELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 91–7506. DUKE *v.* STAGGERS, SUPERINTENDENT, ZEPHYRHILLS CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91–7508. SMITH *v.* ESTLACK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 2d 405.

No. 91–7520. FITE *v.* CANTRELL ET AL. Ct. App. Ky. Certiorari denied.

No. 91–7522. FRENCH ET AL. *v.* RUNDA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1288.

No. 91–7523. GILL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–7525. KLEIN *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 406.

No. 91–7527. BROWN *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 229, 948 F. 2d 1337.

No. 91–7531. RICHARDSON *v.* HESSE, SUPERINTENDENT, CENTENNIAL CORRECTION FACILITY. Sup. Ct. Colo. Certiorari denied. Reported below: 823 P. 2d 150.

No. 91–7539. ASHBURN *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 950 F. 2d 727.

No. 91–7541. GRAY *v.* SILVA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 936 F. 2d 582.

No. 91–7543. WASHINGTON *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1400.

No. 91–7544. SLOCUM *v.* THOMAS, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 91–7552. JOHNSON *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Mich. Certiorari denied.

No. 91–7556. FELIX *v.* BUNNELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7557. HURLBURT *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 135 N. H. 143, 603 A. 2d 493.

No. 91–7558. DILLON *v.* HOUSTON CHRONICLE PUBLISHING CO. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 344.

No. 91–7562. ZHOU *v.* CIARKOWSKI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 947.

No. 91–7571. CARPENTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 91–7576. MARINO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 940 F. 2d 649 and 650.

No. 91–7579. FEATHERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 770.

No. 91–7581. DEL RAINE *v.* HELART. C. A. 7th Cir. Certiorari denied.

No. 91–7582. MIDDLETON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 592 So. 2d 1094.

No. 91–7585. WEBSTER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 3d 411, 814 P. 2d 1273.

No. 91–7586. OSBOND *v.* CRIST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 909.

No. 91–7600. WRIGHT *v.* UNITED STATES PAROLE COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 948 F. 2d 433.

No. 91–7607. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 729.

No. 91–7612. MARTIN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1490.

No. 91–7616. DEL ORBE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91–7630. BEDFORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 589 So. 2d 245.

No. 91–7641. SWINGLER *v.* INTERNAL REVENUE SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 648.

No. 91–7659. GEORGE *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1392.

No. 91–7701. GUAJARDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 203.

No. 91–7704. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 208, 952 F. 2d 1402.

No. 91–7709. KEMP *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1264.

No. 91–7713. BUSCEMI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 87 Md. App. 800.

No. 91–7715. AMOS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 992.

No. 91–7739. COLEMAN *v.* CTI LOGISTICS, INC. C. A. 5th Cir. Certiorari denied.

No. 91–7754. YOUNG *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 91–7755. CARMICHAEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1283.

No. 91–7762. KIBA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 364.

No. 91–7763. GARNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1257.

No. 91–7769. GREEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 58, 952 F. 2d 414.

No. 91–7770. MCLEAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 33, 951 F. 2d 1300.

No. 91–7772. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1261.

No. 91–7774. WALTERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91–7775. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1487.

No. 91–7778. BILLY G. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 362.

No. 91–7787. ALMONTE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 952 F. 2d 20.

No. 91–7788. PATTERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 971 F. 2d 744.

No. 91–7789. RIASGO-BONILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1257.

No. 91–7790. LAWRENCE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 1034.

No. 91–7794. KINARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 2d 404.

No. 91–7801. BRENT, AKA SLAUSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–7802. HANLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–1252. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL. *v.* INDEPENDENT PETROCHEMICAL CORP. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 292 U. S. App. D. C. 19, 944 F. 2d 940.

No. 91–1394. WYLES ET UX. *v.* SWORD, TRUSTEE. C. A. 4th Cir. Certiorari before judgment denied.

No. 91–1395. CELOTEX CORP. *v.* GLASSCOCK ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 946 F. 2d 1085.

No. 91–1425. VASQUEZ, WARDEN, ET AL. *v.* BROWN. C. A. 9th Cir. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 952 F. 2d 1164.

No. 91–1524. CONSOLIDATED RAIL CORPORATION *v.* ESCHBERGER. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 174 App. Div. 2d 983, 572 N. Y. S. 2d 539.

No. 91–7459. SAVENELLI *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari before judgment denied.

No. 91-7483. INGRAM *v.* CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA PAROLE AND COMMUNITY CORRECTIONS BOARD, ET AL. C. A. 4th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 946 F. 2d 885.

MAY 1, 1992

Miscellaneous Order

No. A-808 (91-8111). KENNEDY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

The index and/or table of contents has been removed and photographed separately within this volume year.

For roll film users, this information for the current volume year is at the beginning of the microfilm. For a prior year volume, this information is at the end of the microfilm.

For microfiche users, the index and/or contents is contained on a separate fiche.